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Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care

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LEGAL MALPRACTICE: THE LOCALITY RULE AND OTHER LIMITATIONS OF THE STANDARD OF CARE: SHOULD RURAL AND METROPOLITAN LAWYERS BE HELD TO THE SAME STANDARD OF CARE?

I. INTRODUCTION

Lawyers, like other professionals, are considered to have more knowledge and skill in their discipline than ordinary individuals and therefore have a duty to exercise a higher minimum standard of care in their practice.[1] A breach of this duty is enforcable under the common law tort concept of negligence.[2] Lawyers, however, can also be sued for malpractice and held liable for breach of an implied contractual duty to their client.[3] When an attorney "hangs out his shingle" and accepts a case, he or she impliedly represents to the client that: (1) he or she is as knowledgeable, skilled, and able to practice law as a similarly situated member of his or her profession; (2) his or her best judgment will be used in representing the client; and (3) he or she will exercise reasonable care and diligence in applying his or her special skills and knowledge to the client's case.[4] Both the tort and contract theories establish a minimum level of conduct, which courts usually refer to as the standard of care.[5] Failure to meet this minimal level of skill and care is grounds for a malpractice action and, correspondingly, liability for any damages suffered by the client.[6]

Courts rarely put much weight on the distinction between tort and contract theories in legal malpractice cases except to distinguish statutes of limitation.[7] Under both negligence and con-

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1. *See, e.g.* Theobald v. Byers, 193 Cal. App. 2d 147, __, 13 Cal. Rptr. 864, 865-66 (1961) (defendant attorneys found negligent for failure to advise plaintiffs that chattel mortgage ought to be recorded).

2. ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 301:101 (1984) [hereinafter LAWYERS' MANUAL] (one of the most common theories for liability in malpractice cases is negligence).

3. *Id.* (a second common theory for liability in malpractice cases is for breach of contract).

4. Hodges v. Carter, 239 N.C. 517, 519-20, 80 S.E.2d 144, 145-46 (1954) (defendant attorney did not breach his implied contractual duty to exercise reasonable and ordinary care in applying his skill and knowledge to his client's case).

5. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 250, at 315 (2nd ed. 1981) (the most common forms of attorney malpractice concern professional negligence or breach of implied contract).

6. *Id.* (the standard of care is the basis for determining an attorney's liability in malpractice actions).

7. *See, e.g.*, Harrison v. Casto, 165 W.Va. 787, __, 271 S.E.2d 774, 776 (1980). The plaintiff in *Harrison* retained the defendant attorney to sue another attorney for malpractice. *Id.* at __, 271 S.E.2d at 775. However, the defendant attorney failed to bring

tract theories, courts have required that a plaintiff be in privity of contract with the defendant attorney to have standing to bring suit, unless the intent was for the plaintiff to be a third party beneficiary.[8] This barrier is slowly being broken down by the courts and being replaced with a foreseeability standard.[9] Regardless of which theory is asserted, lawyers are not perfect and will not be held strictly liable for every mistake made in the course of practice.[10]

Some courts have added an additional element to the lawyers' standard of care to allow for differences in available resources and local customs in various communities.[11] This element is often termed the "locality rule" and first appeared in America in medical malpractice cases.[12] The locality rule served to prevent rural doctors from being held to the same standard of care as city doctors, who were presumed to be more skilled and presumed to possess better equipment.[13] If the locality rule is applied to a legal malpractice case, an attorney is required to possess only the skill and diligence ordinarily possessed by other attorneys in the locality or community.[14] For the purpose of this Note, the definition of locality may at times be broader than merely the town or city where the lawyer practices.[15]

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the malpractice suit within the two year statute of limitations for tort actions. *Id.* at __, 271 S.E.2d at 775. Consequently, the plaintiff sued the defendant for malpractice. *Id.* at __, 271 S.E.2d at 775. The case was dismissed by the trial court and the dismissal was affirmed on appeal by the West Virginia Supreme Court of Appeals. *Id.* at __, 271 S.E.2d at 775. The supreme court of appeals held that there was no malpractice because the plaintiff still had a viable breach of contract action against the first attorney because the six year breach of contract statute of limitations had not yet run. *Id.* at __, 271 S.E.2d at 776.

8. LAWYERS' MANUAL, *supra* note 2, at 71:1101-06.

9. *See generally*, Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48, 71 (1981). Rather than use the fallacious and ancient privity requirement to insulate attorneys from liability to third parties, the Note asserts that legal malpractice cases should be analyzed on a case by case basis, focusing on whether reliance by and injury to the third party was foreseeable. *Id.*

10. *See, e.g.*, Savings Bank v. Ward, 100 U.S. 195, 199 (1879) (attorneys must exercise a reasonable degree of care, prudence, diligence, and skill, but "attorneys do not profess to know all the law or to be incapable of error or mistake.").

11. For a general discussion of the locality rule, see *infra* notes 39-88 and accompanying text. For a discussion of the locality rule as applied to legal malpractice, see *infra* notes 112-26 and accompanying text.

12. *See infra* notes 44-57.

13. *Id.*

14. Note, *The Locality Rule in Legal Malpractice Litigation: An Inappropriate Method of Defining the Required Standard of Care*, 9 W. NEW ENG. L. REV. 395, 399 (1986). *See infra* notes 39-88 and accompanying text for a discussion of the history of the locality rule.

15. *See*, R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 335-36. The authors explain the variations among the courts in defining "locality":

> In selecting a geographical limitation on the standard of care, the courts have run the gamut of possible boundaries. Some courts have referred to the

While a locality rule may protect rural practitioners from unrealistic standards, it may also disadvantage plaintiffs in prosecuting a malpractice case.[16] Most courts either allow or require expert testimony at trial to establish the appropriate standard of care, unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge.[17] A locality rule may serve to limit expert testimony to those experts practicing law in the locality where the alleged injury occurred. As in the medical profession, lawyers are often reluctant to testify against fellow practitioners. Therefore, the plaintiff in a legal malpractice case may suffer a disadvantage if a locality rule fosters a "conspiracy of silence."[18] Furthermore, pockets of incompetence could develop as a result of the locality rule. Since expert witnesses must often be drawn from the locality in which the alleged misconduct occurred, it is plausible that the whole population of lawyers in that locality could possess sub-par skills and methods in certain fields of the law (for example, securities, patent, and other highly specialized fields). It would be natural for expert witnesses drawn from such a pool to testify that the skill level common to that locality was adequate. Therefore, it is conceivable that an unacceptably low standard of care could be established for a particular locality. Persons seeking quality legal assistance in that locality would then be at a disadvantage.[19]

Lawyers have a duty to provide competent service to their clients, and if unable to do so, they have a corresponding duty to

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practice "in the same area" or "place." The standard has been applied in the context of the "community or locality." More commonly, the key word is "locality." Selection of locality appears to often confuse the courts. The description of the locality varies widely: the "particular locality," the "lawyer's locality," or more commonly, the "same or similar locality." A frequent characterization of the geographical area is the county in which the lawyer practiced. The most logical and commonly stated territorial selection, however, is that of the state.

Id. (citations omitted). Generally, however, locality refers to the community in which the defendant lawyer practices. *Id.* at 332. This Note examines all the geographical elements added by courts to limit the standard of care.

16. *See infra* notes 123-24 and accompanying text for discussion of the "conspiracy of silence" which is sometimes encountered by a plaintiff in a professional malpractice action.

17. *See generally,* Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney,* 14 A.L.R. 4th 170, 173 (1982) (general rule is that expert evidence is required in legal malpractice cases to establish the standard of care, unless the breach is so obvious that it is within the knowledge and experience of laymen).

18. *See infra* notes 123-24 and accompanying text for a discussion of the "conspiracy of silence" sometimes associated with professional malpractice actions.

19. *See infra* note 125 and accompanying text for a discussion of why incompetent attorneys cannot be allowed to set the requisite standard of care.

refuse service.[20] To be competent, a lawyer must have the knowledge, skill, and experience necessary for the type of case accepted, and must also execute the case diligently and efficiently.[21] Competence is important to a discussion of the locality rule and its derivatives because the norm of competence of lawyers practicing within each community may vary with the makeup of its members.[22] Inclusion of a geographical limitation in the standard of care is legal recognition of this phenomenon.

Recently, commentators have noticed a dramatic increase in the number of malpractice claims.[23] The American Bar Associa-

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20. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1980) [hereinafter MODEL CODE]. The ethical consideration provides:

> [A] lawyer generally should not accept employment in any area of law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client.

Id. The corresponding Disciplinary Rule of the Model Code provides:

> (A) A lawyer shall not:
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

Id. at DR 6-101(A)(1). A corresponding section of the Model Rules provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1984) [hereinafter MODEL RULES]. The relevant portion of the comment to Rule 1.1 of the Model Rules provides:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . .Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

MODEL RULES Rule 1.1 comment (1984).

21. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 252, at 318 ("elements of competence most commonly cited are skill, knowledge, care, diligence and capacity"). The American Law Institute and the American Bar Association (ALI-ABA) define competence as follows:

> Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable.

ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM § 1, at 11 (1980) (Discussion Draft) [hereinafter PEER REVIEW SYSTEM].

22. PEER REVIEW SYSTEM, *supra* note 21, at 11. ("[a]s with the law itself, standards of competence will vary among communities and over time, reflecting differences in experience, values, and available resources.").

23. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 6, at 18 (the 1970s produced four times as many legal malpractice appellate decisions as the 1960s, and almost as many reported

tion and other organizations have assembled committees to study and devise solutions to this problem.[24] These groups of reformers seek to find methods other than judicial enforcement to enhance the competence of lawyers.[25] Such methods may serve to enhance the quality of service to the public and reduce the amount of malpractice claims made against lawyers. The non-judicial remedies may also improve the competence of rural lawyers by providing better resources and opportunities. However, it has been suggested that many legal malpractice suits are not the result of incompetence or negligence, but rather poor client relations.[26]

An alternative to judicial enforcement of the standard of care by a private malpractice action exists under both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.[27] Violation of the Model provisions on competence can

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legal malpractice decisions as were produced in the entire history of American jurisprudence); LAWYERS' MANUAL *supra* note 2, at 301:105 (1984) (same); ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE 1-2 (1986) [hereinafter PROFILE OF LEGAL MALPRACTICE] (premiums for lawyers' professional liability insurance are increasing and availability of coverage is decreasing); ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, THE REPORT ON THE HOUSTON CONFERENCE: ENHANCING THE COMPETENCE OF LAWYERS 223 (1981) [hereinafter HOUSTON CONFERENCE] (there is great troublesome growth of legal malpractice).

24. Committees which have been formed to study the malpractice trend include the ABA Task Force on Professional Competence, the ALI-ABA Committee on Continuing Professional Education, and the ABA Standing Committee on Lawyers' Professional Liability.

25. PEER REVIEW SYSTEM, *supra* note 21, at 3. The reporter for the Peer Review System stated:

> [L]aw practice peer review. . .[is] among many kinds of reforms suggested to deal with the problem of attorney incompetence. Among others are:
> (1) improved legal education;
> (2) improved bar admission screening;
> (3) certification of legal specialists;
> (4) programs of continuing legal education, mandatory or voluntary;
> (5) education of the public better to recognize and avoid the incompetent pracer [sic]; and
> (6) governmental regulation of the legal profession.

Id.

26. *See* HOUSTON CONFERENCE, *supra* note 23, at 40-41. One of the participants at the conference stated:

> [T]he most important thing in the relationship between a lawyer and client is how the lawyer treats the client, not the kind of results the client gets nor the competency of the lawyer.
>
> . . .
>
> Clients are inclined to evaluate lawyers on that personal relationship and not have the capacity to tell how good they are.

Id. at 40, 41.

27. LAWYERS' MANUAL, *supra* note 2, at 01:3. The following states have adopted the Model Rules of Professional Conduct or an amended Model Code which incorporates the substance of the Model Rules: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Virginia, Washington, Wisconsin, and Wyoming. *Id.* States often

be enforced through disciplinary proceedings.[28] Neither the Model Rules nor the Model Code, however, are intended to be used as the basis for imposition of civil liability.[29] Whereas a civil malpractice action is primarily compensatory, disciplinary sanctions promote competence by deterrence.[30] Disciplinary proceedings, however, may not be effective to enforce competency. Two main reasons support this theory. First, formal complaints by fellow practitioners are rare and complaints by clients usually result in civil proceedings for damages.[31] Second, the disciplinary system was designed to deal with intentional misconduct, whereas incompetency is more often a case of negligence.[32] Therefore, disciplinary proceedings may not have a significant impact on raising the level of competency.

The issue this Note seeks to address is whether geographical limitations within the standard of care for lawyers serves the best interests of the legal profession and society. Part II of this Note

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modify the Model provisions to fit the particular preferences of each state. *Id.* at 01:11. The balance of the states probably have a version of the Model Code.

28. *See* MODEL RULES, *supra* note 20, at Preamble (1984); MODEL CODE, *supra* note 20, at Preliminary Statement (1980). For the pertinent provisions of the Model Rules and the Model Code, see *supra* note 20. Failure to comply with the minimum standards set forth by the Model Rules or the Model Code "is a basis for invoking the disciplinary process." *Id.* at 01:103. The disciplinary proceedings are to be conducted in light of the facts and circumstances of the lawyer's conduct at the time in question. LAWYERS' MANUAL, *supra* note 2, at 01:103, 01:302.

The purpose and nature of disciplinary proceedings are set forth in the ABA MODEL STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS 1.1, 1.2 (1983) [hereinafter STANDARDS FOR LAWYER DISCIPLINE]. The STANDARDS FOR LAWYER DISCIPLINE place responsibility in the highest court of each state to organize and administrate the disciplinary system. *Id.* at 2.1. The STANDARDS FOR LAWYER DISCIPLINE also calls for the creation of a disciplinary agency consisting of a board, hearing committees, counsel, and staff. *Id.* at 3.3. Furthermore, the STANDARDS FOR LAWYER DISCIPLINE enumerates grounds for discipline and sanctions. *Id.* at 5.1, 6.1.

29. LAWYERS' MANUAL, *supra* note 2, at 01:104, 01:302; *see also* Martinson Bros. v. Hjellum, 359 N.W.2d 865, 875 (N.D. 1985) (Code of Professional Responsibility is not to be used to define standards for civil liability, but a violation of the Code is rebuttable evidence of legal malpractice); Clay, *Application of the Model Rules to Legal Malpractice*, 1 COMPLEAT LAWYER 37, 39-40 (Summer 1984) (ALI-ABA definition of competence is subjective, and therefore not suitable as a standard of care for lawyers in civil actions).

30. *See In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970) (disciplinary proceedings are neither civil nor criminal in nature, but result from the inherent power which the court has over its officers); LAWYERS' MANUAL, *supra* note 2, at 101:2101 ("purpose of disciplinary proceedings is not to punish the respondent lawyer, but rather to maintain appropriate professional standards in order to protect the public and the administration of justice").

31. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333 (local practitioners are extremely reluctant to testify against fellow attorneys).

32. *See* HOUSTON CONFERENCE, *supra* note 23, at 244. The ALI-ABA commentator explained as follows:

> First, the disciplinary system was designed and created to deal primarily with *intentional* misconduct. An *incompetent* lawyer, virtually by definition, is a lawyer who does something wrong because he or she doesn't know any better. . . .Incompetence, then, is anything *but* intentional misconduct.

Id.

therefore describes the development and evolution of the locality rule.[33] Part III explores the premises and presumptions underlying the various standards that may have geographical limitations.[34] Part III also examines the modern trend of comparing the standard of care for general practitioners to the standard of care for specialists, rather than comparing the rural practice to the urban practice.[35] Part IV of this Note then utilizes North Dakota as a working model to demonstrate how various versions of the standard of care affect the legal profession and society.[36] North Dakota is a rural state, yet contains three standard metropolitan statistical areas.[37] Therefore, because of North Dakota's contrasting needs, it is a useful model for this analysis.[38]

II. DEVELOPMENT OF THE LOCALITY RULE

The locality rule is an element included by some courts in establishing a standard of care for professionals.[39] The rule was developed by the courts to protect professionals located in small, rural communities from being held to the same standard of care as their metropolitan counterparts.[40] Jurisdictions applying the locality rule hold a professional to the level of excellence exercised by an ordinary professional in the locality or community where the particular professional practices.[41] Therefore, the standard of care may vary according to the norm set by similar professionals working in the same area.[42] Furthermore, a locality rule may also serve

33. *See infra* notes 39-88 and accompanying text for a discussion of the history and development of the locality rule.

34. *See infra* notes 89-196 and accompanying text for a discussion of various geographical limitations which are utilized in the standards of care of other jurisdictions.

35. *See infra* notes 197-238 and accompanying text for a discussion of the specialist/generalist variation for a standard of care.

36. *See infra* notes 244-348 and accompanying text for an analysis of variations of the standard of care as applied to North Dakota.

37. *See infra* note 253 and accompanying text.

38. *See infra* notes 244-268 and accompanying text for a discussion of the profile of the North Dakota legal profession.

39. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 332. For further discussion of the locality rule, see *infra* notes 112-26 and accompanying text.

40. *See, e.g.*, Shilkret v. Annapolis Emergency Hosp. Ass'n, 276 Md. 187, __, 349 A.2d 245, 249 (1975) (rationale for the locality rule based upon the inequalities between physicians practicing in large urban areas and those practicing in remote rural areas).

41. J. ELWELL, A MEDICO-LEGAL TREATISE ON MALPRACTICE, MEDICAL EVIDENCE, AND INSANITY 22-23 (4th ed. 1881) (difficult to determine what constitutes ordinary skill for a professional because it may vary within the same state or country).

42. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965). The comment gives a rationale for a standard of care that varies according to the locality of practice:

> Such allowance for the type of community is most frequently made in professions or trades where there is a considerable degree of variation in the skill and knowledge possessed by those practicing it in different localities. It has commonly been made in the cases of physicians or surgeons, because of the

to require lawyers to be familiar with the local rules and customs which also may differ between communities.[43]

The American version of the locality rule was, until recently, associated more closely with the medical profession.[44] Cases and commentary in the late 19th century started a trend in America of applying the locality rule to medical malpractice cases.[45] The Mississippi Supreme Court has applied the same standard of care, which includes a locality rule, to both physicians and lawyers, stating:

> (1) Both are required to use that degree of care, skill and diligence which is commonly possessed and exercised by attorneys/physicians *in that locality.*
>
> (2) Neither is an insurer or guarantor of results which will be attained.
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> (3) Unsuccessful results do not give rise to a presumption of negligence.

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difference in the medical skill commonly found in different parts of the United States, or in different types of communities.

Id.

43. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334.

44. *See* J. ELWELL, *supra* note 41, at 22. Section 299A, comment g of the Restatement (Second) of Torts states that a locality rule is rarely included in the standard of care for lawyers because variations in skill level between different localities are minimal. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965).

45. Tefft v. Wilcox, 6 Kan. 46, 62-64 (1870), *reprinted in* 6 Kan. 33, 42-43 (1884) (2d ed. annot.); *see also* Smothers v. Hanks, 34 Iowa 286, 289-90 (1872) ("standard of ordinary skill may vary even in the same state, according to the greater or lesser opportunities afforded by the locality"); Small v. Howard, 128 Mass. 131, 136 (1880) ("physician in a small country village does not make a specialty of surgery, and. . .would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford") (overruled by Brune v. Bielinkoff, 354 Mass. 102, __, 235 N.E.2d 793, 798 (1968)). The Kansas Supreme Court in *Tefft* borrowed much of its rationale for distinguishing between rural and metropolitan doctors from a medical malpractice treatise. *Tefft*, 6 Kan. at 62-64, *reprinted in* 6 Kan. at 42-43 (2d ed. annot.). *See* J. ELWELL, *supra* note 41, at 22-23. In this treatise, the author explains why rural and metropolitan doctors may be held to different standards of care:

> There are many neighborhoods, in the West especially, where medical aid is of difficult attainment; yet cases of disease and surgery are constantly occurring, and they must, of necessity, fall into the hands of those who have given to the subject but little, if any thought. Thus the inexperienced and the unlearned attend to the surgery in their way, or it is not attended to at all. . . .In these cases, no more. . .should be expected of the operator than the exercise of his best skill and judgment, however limited that might be.
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> . . . .
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> In the smaller towns and country, those who practice medicine and surgery. . .do not enjoy so great opportunities of daily observation, and practical operations. . .as those have who reside in the metropolitan towns. . .and. . .they should not be expected to exercise that high degree of skill and practical knowledge possessed by those having greater facilities for performing and witnessing operations, and who. . .constantly observ[e] the various accidents and forms of disease.

Id.

(4) Both are liable only for negligent failure to use the requisite care and skill.[46]

Typically, courts do not apply the same rule to both doctors and lawyers because the professions are in some ways dissimilar.[47] Nevertheless, the Mississippi formulation outlines the essential elements of a standard of care which includes a locality rule.[48]

The locality rule was applied in medical malpractice cases to take into consideration differing skill, resource, and opportunity levels inherent in a society in transition from an agrarian to an industrial economy.[49] Since the development of modern education, communications, and transportation, a physician's locality of practice, however, no longer provides a clear line for measuring differing levels of skill, opportunity, and resources.[50] Therefore, a standard of care determined by a certified skill level rather than location is a much more direct and specific method of defining the standard of care.[51] Nevertheless, a well drafted standard of care for professionals in general would take into consideration the circumstances of the particular case, which would include the locality of practice when relevant.[52]

Today, the locality rule is being abandoned in medical malpractice cases,[53] the reason being that medical standards are now

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46. Dean v. Conn, 419 So.2d 148, 150 (Miss. 1982) (emphasis added).

47. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334 ("[u]nlike the medical field,. . .knowledge of local practices, rules, or customs may be determinative of. . .the exercise of adequate care and skill").

48. *Dean*, 419 So.2d at 150. For other examples of the locality rule within the standard of care for lawyers, see *infra* note 101.

49. *See* J. ELWELL, *supra* note 41, at 22-23.

50. *See* Shilkret v. Annapolis Emergency Medical Hosp. Ass'n, 276 Md. 187, __, 349 A.2d 245, 249 (1975) (application of the strict locality rule for medical malpractice cannot be reconciled with the realities of the practice of medicine today); Brune v. Bielinkoff, 354 Mass. 102, 352 N.E.2d 793, 796 (1968) ("distinctions based on geography are no longer valid in view of modern developments in transportation, communication and medical education, all of which tend to promote a certain degree of standardization within the profession").

51. *See* Hirschberg v. State, 91 Misc. 2d 590, __, 398 N.Y.S.2d 470, 474-75 (N.Y. Ct. Cl. 1977). The court in *Hirschberg* abandoned the locality rule for medical malpractice cases because it was obsolete and was an imprecise method to define the standard of care for today's physicians. *Id.* at __, 398 N.Y.S.2d at 474-75. The court stated: "The more progressive principle adopted in sister states places the emphasis upon professional proficiency rather than geographical proximity." *Id.* at __, 398 N.Y.S.2d at 474-75.

52. *See, e.g., id.* at __, 398 N.Y.S.2d at 475 ("qualified medical practitioner should be subject to liability in a malpractice action if he fails to exercise that degree of care and skill expected of the average practitioner in the class to which he belongs, having regard for the circumstances under which he must act").

53. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408, 415 (1969); *see also* Shilkret v. Annapolis Emergency Medical Hosp. Ass'n, 276 Md. 187, __, 349 A.2d 245, 249 (1975). The court in *Shilkret* offered a possible rationale for the trend toward abandonment of the locality rule in medical malpractice cases:

> Whatever may have justified the strict locality rule fifty or a hundred years ago, it cannot be reconciled with the realities of medical practice today. "New

becoming more uniform across the nation.[54] Instead of utilizing geographical distinctions, the standard of care for the medical profession is now differentiated by degree of specialization.[55] Therefore, a family practitioner doing emergency heart surgery will not be held to the same standard of care as a heart specialist.[56] However, if a general practitioner is not competent to perform the task and has the opportunity to refer the case to someone who is competent, the generalist has a duty to do so.[57]

In legal malpractice cases, the general rule in the United States has always been that an attorney is liable for lack of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess.[58] The minority trend of applying a locality rule to the standard of care for lawyers began in the 1960s and early 1970s,[59] about a century after the locality rule began to

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> techniques and discoveries are available to all doctors within a short period of time through medical journals, closed circuit television presentations, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses." More importantly, the quality of medical school training itself has improved dramatically in the last century. . . .[T]here now exists a national accrediting system which has contributed to the standardization of medical schools throughout the country.

Id. at __, 349 A.2d at 249 (citations omitted); *see also* Wilkinson v. Vesey, 110 R.I. 606, __, 295 A.2d 676, 682 (1972) (modern systems of transportation and communication, plus a proliferation of literature, seminars and post-graduate courses, make it possible for all practitioners to be reasonably familiar with current medical advances).

54. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 8.06, at 8-83 (1986).

55. *See, e.g., Shilkret*, 276 Md. at __, 349 A.2d at 253 ("physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner *in the same class to which he belongs*, acting in the same or similar circumstances") (emphasis added).

56. 1 D. LOUISELL & H. WILLIAMS, *supra* note 54, at ¶ 3.06.

57. 1 D. LOUISELL & H. WILLIAMS, *supra* note 54, at ¶ 3.07; *see* Hirschberg v. State, 91 Misc. 2d 590, __, 398 N.Y.S.2d 470, 473 (N.Y. Ct. Cl. 1977) (if practitioner has reason to doubt his or her competence to handle the case, he or she must consult those more knowledgeable). The lawyer's duty to refer has also been explicitly stated by several other jurisdictions. *See* Horne v. Peckham, 97 Cal. App. 3d 404, 414, 158 Cal. Rptr. 714, 720 (1979) (lawyers have a duty to refer when they are not competent to handle a given case); Attorney Grievance Comm'n v. Brown, 308 Md. 219, __, 517 A.2d 1111, 1118 (attorney should have known that he needed to associate a specialist). For a discussion of a lawyer's duty to refer, see *infra* notes 329-336 and accompanying text.

58. *See* Savings Bank v. Ward, 100 U.S. 195, 200 (1879) (attorneys are bound to exercise a reasonable degree of care, prudence, diligence, and skill); Spangler v. Sellers, 5 F. 882, 887 (C.C.S.D. Ohio 1881) (lawyer must possess ordinary legal knowledge and skill common to members of the profession); Gambert v. Hart, 44 Cal. 542, 552 (1872) ("rule firmly established in this country by the weight of authority is that an attorney is bound to use ordinary skill and care in the course of his professional employment"); Caverly v. McOwen, 123 Mass. 574, 576, 578 (1878) (lawyer must possess legal knowledge and exercise diligence and skill usually possessed and exercised by ordinary lawyers).

59. *See* Lysick v. Walcom, 258 Cal. App. 2d 136, __, 65 Cal. Rptr. 406, 419 (1968) (expert evidence in malpractice suit is conclusive as to proof of the prevailing standard of skill and learning in the locality); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, __, 269 So. 2d 239, 244 (1972) (lawyer's conduct in a malpractice action is judged against other prudent lawyers practicing in his locality); Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App. 1966) (testimony of an expert that practiced law in a different county than the defendant was not considered by the court as evidence of negligence because the expert

be applied in medical malpractice cases.[60] This development began at roughly the same time that courts began to hold that expert testimony was often "necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice."[61] In 1967, one commenta-

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did not have knowledge of the standard of care in the defendant's county). *See also* Sarti v. Udall, 91 Ariz. 24, __, 369 P.2d 92, 93 (1962) (standard of care for an attorney is the reasonable degree of care and skill in the performance of an attorney's duty in light of all the facts and circumstances of the case); Rhine v. Haley, 238 Ark. 72, __, 378 S.W.2d 655, 661 (1964) (applied standard of care was to be that which would be exercised by an ordinarily careful and prudent practitioner in the county under the same or similar circumstances). Although the trend may have become more prominent in the 1960s and 1970s, as early as the late 18th century, an English court indicated that it may not be fair to hold rural lawyers to the same standards as their urban colleagues. Pitt v. Yalden, 98 Eng. Rep. 74, 75 (K.B. 1767). Lord Mansfield in *Pitt* stated:

> The attornies are far from having been guilty of any gross misbehaviour. It does not appear to me, that they were grossly negligent, or grossly ignorant, or intentionally blamable: *they were country attornies*: and might not, and probably did not know that this point was settled here above. The words of the Act are not so explicit as to direct them clearly: and they might act innocently.
>
> Therefore we ought not to proceed against them in a summary way.

Id. (emphasis added). *Cf.* Pederson v. Dumouchel, 72 Wash. 2d 73, __, 431 P.2d 973, 978 (1967) (locality rule was never adopted by English courts for medical malpractice cases due to the small size of the country); HOUSTON CONFERENCE *supra* note 23, at 53.

60. *See supra* note 45 for the cases and commentary that began the trend of applying the locality rule to medical malpractice cases.

The following statement indicates that the legal profession has lagged behind the medical profession in developing professional standards by several generations and suggests that courts often follow medical professional developments when formulating new standards. The Honorable Norman Krivosha, Lincoln, Nebraska, made the following statements from the Houston Conference floor:

> It seems to be that it is unfortunate we have not taken a sufficient lesson from the medical profession which at the turn of the century concluded that specialization and residency was the way to develop medical competency. At the same time, the legal profession concluded that the general practice and three or four years of law school was adequate.

HOUSTON CONFERENCE, *supra* note 23, at 53.

61. Berman v. Rubin, 138 Ga. App. 849, __, 227 S.E.2d 802, 806 (1976). The following cases mark the beginning of the trend for courts allowing or requiring expert testimony in legal malpractice cases to establish the appropriate standard of care. *See*, Dorf v. Relles, 355 F.2d 488, 492-93 (7th Cir. 1966) (expert testimony is required to make out a prima facie case against a lawyer for negligence); *Sarti*, 91 Ariz. at __, 369 P.2d at 94 ("[w]hether ordinary care and diligence in applying professional skill and learning has been used is a question for experts and can only be established by their testimony"); *Rhine*, 238 Ark. at __, 378 S.W.2d at 661-62 (testimony of attorneys held admissable not as proof of conclusions of law, but rather as evidence of standards of conduct for attorneys in the community in question); *Lysick*, 258 Cal. App. 2d at __, 65 Cal. Rptr. at 419 (breach of duty is usually a question of fact unless it is so obvious that it can be decided as matter of law, and expert testimony is necessary to determine standard of care in the locality); *Cook*, 409 S.W.2d at 477-78 (testimony of expert that practiced law in a different county than defendant was not considered by court as evidence of negligence because the expert did not have knowledge of the standard of care in the defendant's county). The court in *Lysick* expressly stated that until this case, California courts did not require expert testimony to establish the standard of care in legal malpractice cases, and that it had borrowed the rule requiring expert testimony to establish the standard of care for lawyers from medical malpractice cases:

> This rule has been applied in California to medical malpractice cases, and while no cases have been found in this state applying the rule to legal malpractice, there is no reason why the rules of evidence for malpractice against a lawyer should not be the same as those governing cases against doctors.

tor noted: "The vast majority of reported cases do not mention testimony by other attorneys. . . ."[62] However, as early as 1966, several courts began to require the plaintiff to present expert testimony to establish a prima facie case of legal malpractice.[63]

Courts in early American legal malpractice decisions did not allow the use of expert testimony.[64] If the determination of whether there was a duty and a breach thereof was too complex for the jury, the judge would characterize the issue as a question of law, and in effect, serve as the expert witness.[65] The rationale for not allowing expert testimony to establish the standard of care was that it would allow the expert witness to decide an ultimate issue in the case.[66] Under this rule, the judge could take judicial notice of the circumstances under which the lawyer acted, including special characteristics of the locality in which the defendant practiced.[67] Therefore, in these early legal malpractice cases, judges may have in fact applied a locality rule without labeling it as such.

The prevailing view is that both the establishment of the standard of care for lawyers and the determination of a breach of duty are issues of fact.[68] Expert testimony is often necessary to establish these two elements because usually neither is a matter of common knowledge.[69] The Appellate Court of Illinois stated the rationale for characterizing the establishment of the standard of care and the breach thereof as an issue of fact rather than an issue of law as follows: "A determination made by a trial judge based upon a pri-

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Lysick, 258 Cal. App. 2d at __, 65 Cal. Rptr. at 419. *But see* Evans v. Watrous, 2 Port. 205, 210-11 (Ala. 1835), *reprinted in* 6 Ala. 66, 68 (annot. ed. 1910) (attorney's negligence is usually a question of fact for the jury to be determined by evidence of those familiar with the same kind of business); Pennington v. Yell, 11 Ark. 212, 227 (1850), *reprinted in* 5 Ark. (Annot. ed. 1888) (liability of attorney for negligence may be determined by evidence of those who are familiar with the same kind of business); Olson v. North, 276 Ill. App. 457, 485 (1934) (submission of hypothetical question to expert witnesses of whether such conduct was the same as other lawyers would have pursued under similar circumstances held proper); Cochrane v. Little, 71 Md. 323, __, 18 A. 698, 701 (1889) (expert testimony allowed in legal malpractice case to aid jury in considering issue of negligence or want of skill).

62. Note, *Standard of Care in Legal Malpractice*, 43 IND. L. J. 771, 779 (1967-68).

63. *Id.* at 780.

64. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 834-35.

65. Note, *supra* note 62, at 777.

66. *See, e.g.*, Gambert v. Hart, 44 Cal. 542, 549 (1872) (question to expert witness of whether attorneys' conduct constituted negligence held inadmissable because negligence is a question of law for the court to decide).

67. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 842; *Cf.* Note, *supra* note 62, at 778 (judge's private knowledge of circumstances is not an adequate substitute for proof through evidence provided by the parties).

68. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 837; Note, *supra* note 62, at 776.

69. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 837; *see, e.g.*, Lysick v. Walcom, 258 Cal. App.2d 136, __, 65 Cal. Rptr. 406, 419 (1968) (breach of legal standard of care is usually an issue of fact and expert testimony is necessary unless breach is obvious, even to a lay person)

vate investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law."[70]

Today, courts generally require expert testimony to establish the standard of care for a lawyer, unless the facts are such that a layman would have no difficulty in ascertaining the breach of duty.[71] Whether a legal malpractice case is based on a negligence or contract theory, there are four elements which must be proven by the plaintiff to establish a compensable claim: 1) a duty; 2) a breach of the duty; 3) causation; and 4) damages.[72] Expert testimony is useful and often necessary to establish all four elements, but the most common use of expert testimony in a legal malpractice action is to establish the standard of care.[73]

When courts characterize a breach of the standard of care as an issue of fact for a jury, the plaintiff must prove the breach with evidence, usually in the form of expert testimony by other lawyers.[74] When this practice became the norm, it was necessary for courts to include factors within the standard of care such as the locality of practice to put both the parties and the jury on notice that such factors are relevant.[75] Including such factors is important because the standard of care is often stated in abstract terms, yet must be applied to specific facts,[76] and the fact-finder may overlook variations that may exist between communities or other relevant circumstances.[77] A locality rule thus indicates to the trier of fact that the customary level of skill, knowledge, and experience among professionals varies among localities.[78]

Not every malpractice case, however, involves a situation that

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70. House v. Maddox, 46 Ill. App. 3d 68, 72, 360 N.E.2d 580, 583 (1977) (quoting People v. Wallenberg, 24 Ill. 2d 350, 354, 181 N.E.2d 143, 145 (1962)).

71. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 837-38. *See, e.g.*, *House*, 46 Ill. App. 3d at 73, 360 N.E.2d at 584 (expert testimony is not needed when the negligence is apparent and undisputed).

72. R. MALLEN & V. LEVIT, *supra* note 5, § 657, at 811-13.

73. R. MALLEN & V. LEVIT, *supra* note 5, § 666, at 843.

74. R. MALLEN & V. LEVIT, *supra* note 5, § 665, at 838. The authors illustrated the important role that expert testimony has in a legal malpractice action by stating: "The consequence of not producing expert testimony is the failure to prove an essential element of the cause of action which requires a nonsuit or judgment in favor of the attorney." *Id.*

75. *See* Note, *supra* note 62, at 781. The defendant in a legal malpractice case has a natural tendency to draw expert witnesses from the local bar, but when the plaintiff has a duty to present expert testimony to establish a prima facie case, "if locality is to be considered, it becomes necessary to impose a requirement that testimony. . .be given *with reference to* the locality in which the defendant practices." *Id.* (emphasis added).

76. Note, *supra* note 62, at 775-76 (particularization of the standard of care is of paramount significance).

77. Note, *supra* note 62, at 782 (without locality element, court may not consider differences in resources and opportunities among attorneys in different communities).

78. Note, *supra* note 62, at 781.

is affected by the locality of practice.[79] Therefore, the application of the locality rule is fact-specific and will not be an issue in every case.[80] Nonetheless, in appellate opinions where the locality of practice is not at issue, courts that recognize a locality rule will often state the standard of care and include a locality rule without applying it to the facts.[81] In such cases, inclusion of a locality element is dicta and provides no analytical support for this concept.[82]

Including a locality element in the standard of care for lawyers serves to disqualify expert witnesses who are not familiar with the particular characteristics of practice in the community where the defendant lawyer practices.[83] This limiting function of a locality rule protects a defendant lawyer from being held to an unfamiliar standard of care established by a foreign expert witness.[84] On the other hand, inclusion of a locality element within the standard of care can make it difficult for the plaintiff to retain expert witnesses because attorneys practicing within the same community may be reluctant to testify against their peers.[85] Therefore, as expert testimony becomes more important in legal malpractice cases, courts will tend to broaden or eliminate geographical limitations to enhance the plaintiff's ability to retain qualified experts and present a stronger case.[86]

Although the minority trend of applying a locality rule to legal malpractice cases did not become apparent until the 1960s, language in several earlier cases indicated that courts had taken notice of the locality of practice and other relevant circumstances all along.[87] These cases, however, do not cite to any common

79. *Cf.* RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965) (when standards of profession in different localities are uniform, courts are not required to instruct on the issue of locality).

80. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 337 (it is unnecessary to include locality in the jury instructions, except to the extent that local considerations are relevant circumstances).

81. *See, e.g.*, Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180-81 (N.D. 1981). In *Sheets*, the court stated that the standard of care is the degree of skill ordinarily possessed by lawyers in good standing in similar communities. *Id.* at 180. In the analysis that followed, however, no mention was made of the community in which the defendants practiced. *Id.* at 180-81.

82. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 332 (references to the locality of practice without analysis constitutes dictum).

83. Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App. 1966).

84. *Id.*; *see* Note, *supra* note 62, at 781 (locality rule excludes testimony of professionals who practice in different communities because they are not aware of the environment in which the defendant acted); *Cf.*, Pederson v. Dumouchel, 72 Wash. 2d 73, __, 431 P.2d 973, 977 (1967) ("[w]hen there was little intercommunity travel, courts required experts who testified to the standard of care [for physicians]. . .to have a personal knowledge of the practice of physicians in that particular community. . . .").

85. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333.

86. D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 2:11 (1980).

87. *See* Cox v. Sullivan, 7 Ga. 144, 148 (1849) (skill required has reference to the

authority, and thus, no trend can be identified.[88] Perhaps courts applied a locality rule without identifying it as such by merely applying the general rule to all the facts and circumstances of the case, which would include the locality of practice.

The next section will review cases defining the standard of care, including those jurisdictions utilizing a basic locality rule as described above, as well as other jurisdictions which have utilized various modifications designed to alleviate some of the problems associated with the locality rule. Like the judicial history in medical malpractice cases, it appears that legal malpractice precedent is also coming full circle — first adopting, then abandoning the locality rule in response to changing conditions.

III. RURAL AND URBAN LAWYERS — THE REQUISITE STANDARD OF CARE FOR LEGAL MALPRACTICE

A. ANALYSIS OF THE LOCALITY RULE AND MODERN VARIATIONS

The locality rule in its basic form was adopted to protect rural attorneys from exposure to unrealistic standards of care and to hold all lawyers responsible for knowledge of local rules and customs. The basic locality rule served an important purpose during an era in which both communication and transportation were slow, and rural lawyers were isolated from the progress occurring in metropolitan areas. In applying the locality rule to both medical and legal malpractice cases, courts began to recognize that its use hampered the use of expert testimony.[89] The following discussion illustrates the problems inherent with the basic locality rule

character of the business which he has to do); Hillegass v. Bender, 78 Ind. 225, 227 (1881) (attorney must be acquainted with the settled rules of law and practice in the courts prevailing in the locality wherein he practices); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904) (quoting Annotation, *Liability of Attorney to Client for Mistake*, 52 L.R.A. 883, 893 (1901)) ("attorney is expected and required to possess such reasonable skill and diligence in all questions relating to his profession as are recognized by the profession where he practices law"). The rules announced in the following cases do not serve to specifically protect rural lawyers from unreasonably high standards, but rather to hold all lawyers to be well-acquainted with the local rules and practice where he or she practices. Gabbert v. Evans, 184 Mo. App. 283, __, 166 S.W. 635, 638 (1914) (quoting 4 CYCLOPEDIA OF LAW & PROCEDURE, *Attorney and Client*, at 965 (1902)) ("attorney must be acquainted with the statutes and the settled rules of law and practice in the courts prevailing in the locality wherein he practices, and is responsible for loss to his client resulting from ignorance thereof"); *In re* Woods, 158 Tenn. 383, __, 13 S.W.2d 800, 803 (1929) (quoting 2 R.C.L. *Attorneys at Law* § 97 (1914)) ("attorney is liable. . .for the consequences of his ignorance or nonobservance of the rules of court in which he practices, or for his ignorance of the statutes and published decisions of his own state").

88. *See* cases cited *supra* note 87.

89. See *supra* notes 83-84 and accompanying text for cases discussing how the locality rule affects the use of expert testimony.

and the efforts courts have made to alleviate such problems. While fashioning new standards, courts often strive to keep the basic protection provided by the locality rule by imposing higher standards on lawyers with greater resources and holding lawyers with fewer resources to lesser standards.[90]

Unlike the medical profession, the legal profession does not have a national standard of care or certification program.[91] Each state has general jurisdiction over most legal malpractice cases under its police power and the state courts apply the law of each particular state.[92] The idea of a national standard of care has been suggested,[93] and many states do apply a general standard which does not take into account any geographical boundaries.[94] The closest the legal profession comes to a national system of regulation is the adoption by each state of either the ABA Model Code of Professional Responsibility or the ABA Model Rules of Professional Conduct.[95]

In their treatise on legal malpractice, Ronald Mallen and Victor Levit have formulated a composite standard of care for lawyers from the common law which provides: "To determine the reasonableness of the lawyer's conduct, it is necessary to consider

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90. PEER REVIEW SYSTEM, *supra* note 21, at 11 (standards of competence vary, reflecting differences in experience, values, and available resources).

91. *See* Russo v. Griffin, 147 Vt. 20, __, 510 A.2d 436, 439 (1986) (legal profession has not established a national certification for lawyers); LAWYERS' MANUAL, *supra* note 2, at 21:4001 (ABA has taken the position that regulation of specialists is the province of the states).

92. *See* LAWYERS' MANUAL, *supra* note 2, at 301:102 ("[t]here are slight variations from jurisdiction to jurisdiction in the formulation of the standard used to determine whether there is breach of duty"). All states require that an attorney must obtain a license from state regulatory authorities to practice law. *Id.* at 21:101. Attorneys are therefore considered officers of state courts. *See* Note, *supra* note 62, at 777.

93. *Russo*, 147 Vt. at __, 510 A.2d at 439.

94. The following jurisdictions use a general standard of care for legal malpractice: California (*see* Day v. Rosenthal, 170 Cal. App. 3d 1125, 1143, 217 Cal. Rptr. 89, 99 (1985) (such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess.)); Colorado (*see* Myers v. Beem, 712 P.2d 1092, 1094 (Colo. Ct. App. 1985) (knowledge, skill, and judgment ordinarily possessed by members of the legal profession)); Iowa (*see* Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982) (such skill, prudence and diligence as lawyers of ordinary skill commonly possess)); Massachusetts (*see* Fishman v. Brooks, 396 Mass. 643, __, 487 N.E.2d 1377, 1379 (1986) (degree of care and skill of average, qualified, practitioner.)); New Jersey (*see* St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, __, 443 A.2d 1052, 1060-61 (1982) (knowledge and skill that lawyers of ordinary ability possess.)); New Mexico (*see* First Nat'l Bank of Clovis v. Diane, Inc., 102 N.M. 548, __, 698 P.2d 5, 9 (N.M. Ct. App. 1985) (skill, knowledge, and prudence that lawyers of ordinary skill and capacity commonly possess.)); New York (*see* Beer v. Florsheim, 96 A.D.2d 485, __, 465 N.Y.S.2d 196, 198 (N.Y. App. Div. 1983) (skill commonly possessed by members of his profession)); Pennsylvania (*see* Gans v. Mundy, 762 F.2d 338, 341 (3rd Cir. 1985) (skill generally possessed by practitioners of the profession.); Ee Bon Ee Baya Ghananee v. Black, 350 Pa. Super. 134, __, 504 A.2d 281, 284 (1986) (ordinary skill and knowledge)); Utah (*see* Jackson v. Dabney, 645 P.2d 613, 615 (Utah 1982) (legal knowledge and skills common to members of his profession)).

95. *See* MODEL CODE and MODEL RULES, *supra* note 20.

the following criteria: the requisite skill and knowledge; the degree of skill and knowledge to be possessed and exercised; the effect of local considerations and custom; and any special abilities possessed by the lawyer."[96] Even though the inclusion of a locality element in the standard of care is a minority position,[97] these authors have deemed local considerations to be of sufficient importance to include it in their composite standard.[98] Even so, Mallen and Levit have translated locality, custom, and special skills into an even simpler standard, labeling these elements "similar circumstances."[99] Requiring lawyers to exercise the degree of skill, knowledge, and care that ordinary lawyers would exercise under similar circumstances gives the court the flexibility to consider all relevant factors when defining the standard of care, rather than only those enumerated in formulas set forth by appellate courts.[100]

A minority of jurisdictions do, however, take into consideration the specific locality or community where the defendant lawyer practices when defining the standard of care.[101] In addition, there are also several jurisdictions which apply variations of the geographical limitations to the standard of care for lawyers that are broader than the specific locality of practice.[102] Geographic limitations of the standard of care for lawyers can be grouped into four categories. Courts will usually state a general rule such as that stated by the Kansas Supreme Court in *Bowman v. Doherty*,[103] that "[a]n attorney is obligated to his client to . . . use his best judg-

96. R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 317-18.

97. For cases utilizing a locality element, see *infra* note 101.

98. R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318.

99. *Id.*

100. *Id.*, § 254, at 337. For a discussion of the similar circumstances element of the standard of care for lawyers, see *supra* notes 172-96 and accompanying text.

101. *See*, Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983) (lawyer required to exercise ordinary and reasonable level of skill, knowledge, care, attention, and prudence common to members of legal profession in the community); Rhine v. Haley, 238 Ark. 72, __, 378 S.W.2d 655, 661 (1964) (requisite standard of care is what an ordinarily careful and prudent practitioner in the county would have done); Bowman v. Doherty, 235 Kan. 870, __, 686 P.2d 112, 120 (1984) (attorney must use reasonable and ordinary care and diligence, his or her best judgment, and exercise reasonable degree of learning, skill, and experience ordinarily possessed by attorneys in the community); Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, __, 269 So. 2d 239, 244 (1972) (attorney obligated to exercise degree of care, skill, and diligence exercised by prudent attorneys in his locality); Dean v. Conn, 419 So. 2d 148, 150 (Miss. 1982) (attorneys and physicians are required to use degree of skill and diligence commonly possessed and exercised in that locality); Arp v. Kerrigan, 287 Or. 73, __, 597 P.2d 813, 821 (1979) (attorney required to use care, skill, and diligence ordinarily used by lawyers in the community in similar circumstances); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904) (attorney required to use skill and diligence as recognized by the profession where he practices law).

102. For a discussion of geographical limitations other than the locality rule, see *infra* notes 106-07 and accompanying text; *see also* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 335-36 (variation among courts in defining "locality").

103. 235 Kan. 870, 686 P.2d 112 (1984).

ment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other attorneys."[104] One or more of the following elements is then added to limit the general rule:

1) in the locality or community,[105]
2) in similar localities,[106]
3) in the state or jurisdiction,[107] or
4) under similar circumstances.[108]

The addition of such elements particularizes the standard of care and forces the court and the parties to take note of the different

104. *Id.* at __, 686 P.2d at 120.

105. For a discussion of jurisdictions utilizing the "in the locality or community" variation, see *supra* note 101 and accompanying text.

106. *See* Bent v. Green, 39 Conn. Supp. 416, __, 466 A.2d 322, 325 (1983) (level of duty was to exercise the same degree of care, skill, and diligence which other attorneys in the same or similar locality and in the same line of practice possess acting under similar circumstances); Rorrer v. Cooke, 313 N.C. 338, __, 329 S.E.2d 355, 366 (1985) (standard is that of members of the profession acting in the same or similar locality under similar circumstances); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D. 1981) (attorney is held to the degree of skill, care, diligence and knowledge ordinarily possessed by members of the legal profession in good standing in similar communities); Lenius v. King, 294 N.W.2d 912, 913-14 (S.D. 1980) (attorney has a duty to have the degree of learning and skill ordinarily possessed by attorneys in good standing engaged in the same type of practice, in the same or similar locality, under similar circumstances); *see also* RESTATEMENT (SECOND) OF TORTS § 299A comment g. (1965) ("standard is rather that of persons engaged in similar practices in similar localities, considering geographical location, size, and generally, the character of the community").

107. *See* Kellos v. Sawilowsky, 254 Ga. 4, __, 325 S.E.2d 757, 758 (1985) (applicable standard in Georgia is that of the state); Hutchinson v. Smith, 417 So. 2d 926, 928 (Miss. 1982) (attorney must execute the case with the degree of care, skill, and diligence commonly possessed and exercised by attorneys in the jurisdiction); Martinson Bros. v. Hjellum, 359 N.W.2d 865, 872 (N.D. 1985) (lawyers must exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers in the state); Feil v. Wishek, 193 N.W.2d 218, 225 (N.D. 1971) (same); Cleckner v. Dale, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986) (same); Russo v. Griffin, 147 Vt. 20, __, 510 A.2d 436, 438 (1986) (same); Halvorsen v. Ferguson, 46 Wash. App. 708, 712, 735 P.2d 675, 678 (1986) (attorneys must exercise the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in the jurisdiction); Cook, Flanagan & Berst v. Clausin, 73 Wash. 2d 393, __, 438 P.2d 865, 866-67 (1968) (same).

108. *See* Sarti v. Udall, 91 Ariz. 24, __, 369 P.2d 92, 93 (1962) (standard of care must be decided in light of all the facts and circumstances); Wright v. Williams, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194, 199 (1975) (standard is that of lawyers in the same or similar locality under similar circumstances); Ishmael v. Millington, 241 Cal. App. 2d 520, __, 50 Cal. Rptr. 592, 595 (1966) (same); O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (lawyer must exercise degree of care and skill expected of lawyers acting under similar circumstances); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) (lawyer must use knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances); Meagher v. Kavli, 256 Minn. 54, 57, 97 N.W.2d 370, 373 (1959) (lawyers conduct is to be appraised in light of all circumstances); Cook v. Irion, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966) (lawyer impliedly represents he or she possesses the degree of learning, skill, and ability which others similarly situated possess); Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, __, 362 N.W.2d 118, 128 (1985) (standard for legal malpractice is what a reasonable or prudent attorney would have done in the same circumstance); *see also*, Olson v. North, 276 Ill. App. 457, 485 (1934) (expert opinion allowed to determine if the defendant's action was the same as other reputable lawyers would have pursued under like circumstances).

conditions under which attorneys must work, on the assumption that they are essential to an objective evaluation of the defendant's conduct.[109] The fourth category listed above, similar circumstances, is included as a geographical limitation because when the locality of practice is relevant, it can be considered a circumstance included in the standard of care.[110]

Although the aforementioned variations to the standard of care all involve geographical limitations, there are other methods available for particularizing a standard of care for attorneys. This section also discusses the application of a higher standard of care for legal specialists.[111] A higher standard for specialists functions similarly to the four geographical limitations in that it varies the standard of care in relation to the resources available to different classes of lawyers. The following analysis will consider why courts may choose to add one or more of the elements listed above to the general rule, or choose to adopt a general standard of care which does not include a locality element.

1. *The Basic Locality Rule: "In the Locality" or "In the Community"*

This section discusses the locality rule, which in its narrowest form holds a lawyer to the standard of an ordinary attorney practicing in the same locality as the defendant.[112] Typically, when the basic locality rule is at issue, the defendant is attempting to use it to lower the standard of care.[113] There are, however, two situations in which a locality rule may serve to raise the standard of care: 1) the existence of numerous specialists in a given area; and 2) the existence of special local rules and customs.

Most lawyers who specialize are located in metropolitan areas.[114] Consequently, the normal level of skill in a metropolitan

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109. *See* Note, *supra* note 62, at 775 ("objectivity is achieved through the. . .technique of determining customary professional conduct in similar circumstances, and holding the defendant liable only for a deviation from that custom").

110. R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318.

111. For the discussion of a higher standard of care for legal specialists, see *infra* notes 197-238.

112. For a discussion of jurisdictions utilizing a locality limitation in the standard of care for legal malpractice, see *supra* note 101 and accompanying text.

113. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333. The original rationale for the locality rule was to protect the rural attorney from the higher standard of care established by urban attorneys. *Id.*

114. D. MEISELMAN, *supra* note 86, § 2:11, at 35 (although communication and education are improved, legal specialization is more common in metropolitan areas than in less populated regions); *cf.* Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281, 290 (1973) (community standard takes into account differences in local practice and also the differences in resources and opportunities available to urban specialists and rural generalities).

locality with a high population of specialists may be close to that of a specialist. The locality rule functions to vary the standard of care according to the customary level of skill in a particular locality.[115] Therefore, hypothetically, the locality rule could be used to raise the degree of skill in a large city to an unreasonably high level, in effect creating an unworkable environment for the general practitioner. Under such an enhanced standard of care, an ordinary general practitioner may have a duty to refer many of his or her potential clients to a specialist, thereby reducing income opportunities.[116] Therefore, like the proverbial two-edged sword, application of a locality rule could serve to injure as well as protect lawyers in certain situations such as this.

A second situation in which the locality rule may increase the requisite standard of care is the existence of local rules and customs, of which a lawyer practicing in that community must be aware of and apply in his or her practice.[117] In this situation, a lawyer will be held to a higher standard of knowledge of the local rules than an attorney from another locality, and therefore, the local attorney is in fact a specialist of sorts.[118] In addition, special characteristics about a community such as local customs or peculiarities may affect the appropriate strategy necessary to be an effective advocate.[119] In such a situation, an attorney in that locality would have the additional responsibility of evaluating and accounting for such special characteristics.[120] Therefore, in addition to the rationale for a locality rule parallel to that in medical malpractice cases of protecting rural practitioners from unreasonably high standards, there exists this additional rationale for includ-

115. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333.

116. For a discussion of a lawyer's duty to refer, see *infra* notes 329-36 and accompanying text.

117. *In re* Gabbert v. Evans, 184 Mo. App. 283, __, 166 S.W. 635, 638 (1914) (quoting 4 Cyc. *Attorney and Client*, at 965 (1902)) ("attorney must be acquainted with the statute and the settled rules of law and practice in the courts prevailing in the locality wherein he practices, and is responsible for loss to his client resulting from ignorance thereof"); *In re* Woods, 158 Tenn. 383, __, 13 S.W.2d 800, 803 (1929) ("attorney is liable. . .for the consequences of his ignorance or nonobservance of the rules of court in which he practices, or for his ignorance of the statutes and published decisions of his own state"); R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334.

118. R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 328 (attorneys are specialists in regard to the rules, practices, or laws peculiar to the locality where they practice).

119. *See, e.g.*, Cook v. Irion, 409 S.W.2d 475, 477-78 (Tex. Civ. App. 1966) (makeup of the jury panel and knowledge of the local situation are important considerations for a lawyer to recognize when planning the strategies for a case); R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334 (racial, economic, or social characteristics of a community may be important for planning the strategy of a case).

120. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334 (attorney may be negligent for having lack of knowledge of characteristics of local community and judicial rules).

ing a locality rule in the standard of care for lawyers.[121]

The basic "in the locality" option has been criticized as unworkable.[122] There are two basic complaints. The first complaint is that such a standard, in effect, eliminates the use of expert testimony by the plaintiff to establish an appropriate standard because attorneys in the same community are often reluctant to testify against each other.[123] This same "conspiracy of silence" exists in medical malpractice cases.[124] The second complaint, as stated by the Restatement (Second) of Torts, is that "[i]f there are only three physicians in a small town, and all three are highly incompetent, they cannot be permitted to set a standard of utter inferiority for a fourth who comes to town."[125] To combat these inherent problems, the Restatement (Second) of Torts adopted the "similar communities" standard, which allows expert testimony by attorneys from communities of similar size and character.[126] This variation of the locality rule is discussed in the next section.

2. *"Similar Locality or Community" Variation*

Some courts have expanded the scope of the standard of care for lawyers beyond the specific locality or community where the defendant practices.[127] The "similar localities" standard is an element added to the standard of care which requires that a lawyer attain the level of skill and exercise the degree of care as would an

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121. *Id.*

122. *See* Note, *supra* note 14, at 404 (adherence to a locality-based standard hinders the prosecution of legal malpractice claims). New Hampshire enacted a statute that specifically removes any reference to a professional's locality or any other geographical area. N.H. REV. STAT. ANN. § 508:13 (1983). The statute provides that "the jury or judge shall not be bound or limited by the standard of care accepted or established with respect to any particular geographical area or locality. . . ." *Id.*

123. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333. The authors explain the expert shortage and "conspiracy of silence" caused by the inclusion of a locality rule in the standard of care:

> If expert testimony is required, locality considerations may limit the geographical area from which such testimony must be produced and thereby impair the ability of the plaintiff to establish his case. . . .The plaintiff may find extreme reluctance among local practitioners to testify against a fellow attorney.

Id.

124. *See* Hansbrough v. Kosyak, 141 Ill. App. 3d 538, __, 490 N.E.2d 181, 185 (1986) (obtaining expert testimony from physician in the same community was difficult thereby creating a "conspiracy of silence" which deprived plaintiffs of the expert medical testimony essential to establishing a medical malpractice case).

125. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965).

126. *Id.* Comment g of § 299A of the Restatement (Second) of Torts states that the "similar communities" standard does not apply to lawyers because there is little variation in skill and knowledge between communities. *Id.* For an additional discussion of the "similar communities" standard, *see infra* notes 127-60 and accompanying text.

127. Note, *supra* note 14, at 404 n.59. For a discussion of jurisdictions utilizing the "similar locality or community" standard, see *supra* note 101.

ordinary lawyer practicing in a similar community.[128] Expansion of the basic locality standard allows either party to bring in expert witnesses from outside the community where the alleged misconduct occurred.[129] This serves to alleviate the expert shortage and "conspiracy of silence" that plagued the application of the basic locality rule.[130]

Although the "similar localities" standard serves to alleviate problems associated with the narrow locality rule, it can also be a source of other problems.[131] For instance, since the "similar localities" standard allows the parties to bring in expert witnesses from outside the locality of practice, courts must determine whether the expert's locality of practice is "similar" to that of the defendant.[132] When making this determination, the court should consider the geographic location, size, and character of the expert's locality.[133] Properly chosen, an expert from a locality demographically similar to the defendant attorney's locality will share similar resources, experience, and opportunities.[134] Nonetheless, an expert from a similar but different locality may be completely ignorant of the rules, customs, and characteristics peculiar to the practice of law in the defendant's locality.[135]

The often cited case of *Cook v. Irion*[136] is illustrative of the problems associated with the "similar localities or communities" rule. In *Cook*, the plaintiffs retained the defendant attorney to prosecute a personal injury action in El Paso County, Texas, which had a population of 314,070 at the time of the action.[137] During a shopping center's grand opening promotion, plaintiff Cook tripped on a television cable in a shopping center and fell, sustaining an injury.[138] The three potential defendants were the

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128. For a discussion of jurisdictions utilizing a "similar localities" variation, see *supra* note 106.

129. *See, e.g.*, Hansbrough v. Kosyak, 141 Ill. App. 3d 538, __, 490 N.E.2d 181, 185 (1986) (similar community standard serves to defeat the "conspiracy of silence").

130. For a discussion of the "conspiracy of silence" associated with expert testimony and legal malpractice, see *supra* notes 123-26 and accompanying text. *See also Hansbrough*, 141 Ill. App. 3d at __, 490 N.E.2d at 185 (similar community standard serves to defeat the "conspiracy of silence").

131. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334-35.

132. Note, *supra* note 14, at 404 n.59.

133. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965).

134. *Cf.* Note, *supra* note 62, at 782 (lawyers' resources, opportunities, and experience vary among communities).

135. *Id.* One legal writer has noted that "what constitutes proper legal practice in one community may not be proper in another, even though the external resources and other features of the communities are identical." *Id.*

136. 409 S.W.2d 475, 478 (Tex. Civ. App. 1966).

137. *See* Cooke v. Irion, 409 S.W.2d 475, 476, 478 (Tex. Civ. App. 1966).

138. *Id.* at 476.

shopping center, the television company, and the merchants' association who sponsored the promotion.[139] Upon the advice of the defendant attorney, only the merchants' association was named as a defendant in the plaintiffs' personal injury claim.[140] An instructed verdict was granted to the merchants' association, a take-nothing judgment was entered, and no appeal was made.[141] The plaintiffs then proceeded to sue the defendant attorney for malpractice, contending that the defendant attorney was negligent in suing only the merchants' association.[142]

The plaintiffs retained as an expert witness, an attorney who practiced in Brewster County, Texas, which was 220 miles away and had a population of 6,434.[143] In addition, the plaintiffs' expert witness had never tried a case in El Paso County.[144] The trial court permitted the plaintiffs' expert witness to testify that the defendant "had failed to exercise the standard of care of the average general practitioner in the State of Texas in not suing all three of the possible defendants."[145] The Texas Court of Civil Appeals disagreed, holding that the plaintiffs' expert witness was not qualified to testify as to the standard of care in El Paso County.[146]

The Texas Court of Civil Appeals in *Cook* approved the standard of care set forth in the often cited 1954 North Carolina case of *Hodges v. Carter*.[147] The *Hodges* version of the standard of care for lawyers demands that an attorney possess the skill "which others similarly situated ordinarily possess. . . ."[148] Apparently, the Texas Court of Civil Appeals court interpreted the *Hodges* language as applied to this case to call for the degree of care, skill, and

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139. *Id.*

140. *Id.* The plaintiff originally brought suit against the shopping center. *Id.* This claim, however, was dropped and another claim was made against the merchants' association. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 477-78.

144. *Id.* at 477.

145. *Id.* The defendant attorney in *Cook* objected to the admission of the plaintiff's expert testimony, but the objection was overruled and the testimony was allowed. *Id.*

146. *Id.* at 478. Referring to the defendant attorney's decision to sue only the merchants' association, the Texas Court of Civil Appeals in *Cook* noted that even though the shopping center was not made a defendant, the corporation which owned the shopping center was a member of the merchants' association. *Id.* at 477-78. The court therefore affirmed the trial court's result which was a directed verdict for the defendant, holding that since the plaintiff's expert witness was not qualified to testify as to the standard of care in El Paso County, the evidence the plaintiff presented was insufficient to establish that the defendant was negligent in handling the plaintiff's lawsuit. *Id.* at 478.

147. *Id.* at 477 (quoting *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 145-46 (1954)). For the language relied on by the Texas Court of Civil Appeals, see *supra* note 4 and accompanying text.

148. *Hodges*, 239 N.C. at 520, 80 S.E.2d at 146.

diligence customarily exercised by attorneys practicing in El Paso County.[149]

In holding that the plaintiffs' witness was not qualified to testify as to the standard of care in El Paso County, the Texas Court of Civil Appeals stated that, "[i]n this situation it was a matter of judgment to be exercised in the light of the local situation and the attorney's experience, as to whether any advantage could be gained by joining additional defendants."[150] The court further explained its conclusion that the expert witness was not qualified to testify by stating:

> [A]n attorney practicing in a vastly different locality would not be qualified to second-guess the judgment of an experienced attorney of the El Paso County Bar as to who should be joined as additional party defendants. . . .[T]he probable make-up of the jury panel is an important consideration of whom to sue where there is an option. The importance of knowledge of the local situation is fully demonstrated by the well-recognized practice among the lawyers of this State in associating local counsel in the trial of most important jury cases.[151]

The court concluded that since the plaintiffs' expert witness was not qualified to testify as to the standard of care in El Paso County, the plaintiffs failed to establish that the defendant attorney was negligent in the handling of the plaintiffs' lawsuit.[152]

Although the court in *Cook* did not explicitly include a "similar communities" element in its version of the standard of care for lawyers,[153] *Cook* provides a good analysis of the inherent problems in the "similar localities or communities" standard in determining whether the expert witness is qualified to testify as to the standard of care for the particular defendant lawyer.[154] The court in *Cook* recognized that the locality where the defendant practiced and the locality where the expert witness practiced were "vastly different" due to the difference in population and distance apart.[155]

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149. *See Cook*, 409 S.W.2d at 478.
150. *Id.* at 478.
151. *Id.*
152. *Id.*
153. *Id.* at 477. The court used the standard of care articulated in *Hodges v. Carter*. *Id.*; *see* Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 145-46 (1954). The *Hodges* standard requires attorneys to use the degree of skill which others similarly situated possess. *Hodges*, 239 N.C. at 520, 80 S.E.2d at 145-46.
154. *See Cook*, 409 S.W.2d at 477. *See also* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334-35 (citing *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App. 1966)).
155. *Cook*, 409 S.W.2d at 478.

Therefore, the court implicitly recognized that an expert witness from a community very similar to the defendant's may have been qualified to present evidence of the standard of care applicable to the defendant. Even so, the court emphasized the importance of factors such as "the probable make-up of the jury" and "knowledge of the local situation."[156] This emphasis on the particular characteristics of the locality in which the defendant practiced indicates that the court may have preferred the basic locality rule to the "similar localities or communities" standard.

The *Cook v. Irion* rationale for including a locality element in the standard of care for lawyers is dissimilar to the rationale which explains its use in medical malpractice cases.[157] Unlike medical practice, legal practice is often affected by local customs, practices, and characteristics.[158] Such parochial factors which influence an attorney's actions are often intangible, except to a practitioner experienced in dealing with them, and thus, an attorney must be given a certain degree of flexibility in judgment which cannot be specifically written into a rule.[159] Therefore, even though an expert witness may be from a community that is demographically similar to the community in question, he or she may not be qualified to determine the appropriate standard of care for that particular situation.[160]

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156. *Id.*

157. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334. Citing *Cook* as an example, the authors stated that "[u]nlike the medical field,. . .knowledge of local practices, rules, or customs may be determinative of, and essential to, the exercise of adequate care and skill." *Id.*

158. *Id.* (attorneys in general must be knowledgeable of local statutes or ordinances, and trial attorneys, in particular, place great weight on the racial, economic, or social characteristics of the community).

159. *See* J. ELWELL, *supra* note 41, at 25-26 (physicians and attorneys must deal with contingencies which no person can feel sure of anticipating or controlling).

160. *See* Note, *supra* note 62, at 782; *cf.* Gleason v. Title Guarantee Co., 317 F.2d 56, 60 (5th Cir. 1963). In *Gleason*, the defendant attorney erroneously certified clear title to property his client was contemplating purchasing. *Id.* at 58. In performing a title search, the attorney had relied on information from abstract companies. *Id.* at 59. Unfortunately, the tract book the abstract companies were using was six weeks behind. *Id.* In his defense, the defendant attorney claimed that reliance on such records was the custom of attorneys in his locality. *Id.* at 60. From a judgment issued against him, the defendant attorney appealed. *Id.* at 56. The Fifth Circuit Court of Appeals stated:

> Counsel stresses particularly that [appellant-attorney's] duty to the plaintiff must be measured by the community standards of professional conduct prevailing in Brevard County at the time [he] did his work. . . .
>
> This Court and trial court had no quarrel with the law the appellant cites. As the trial judge said, "Except for the situation that developed in Brevard County during the land boom, * * * [this case] does not present any question at all.". . .
>
> . . .[I]n the record before us there is no evidence whatsoever that the community condoned the absence of a proper caveat to the certification which would indicate the time lag between the date of the attorney's last reliable information and the date of the certificate.

3. *"In the State or Jurisdiction" Variation*

A few courts have defined the locality of practice broadly to include the state or jurisdiction.[161] Under this standard, all lawyers within the state or jurisdiction are held to the same level of excellence.[162] The rationale for this variation of the locality rule is that all lawyers within a state must pass the same entrance examination.[163] The effect of the rule is to limit expert testimony to lawyers who practice within the jurisdiction.[164] Therefore, this standard serves to prevent the importation of experts from foreign jurisdictions and thus protects the defendant practitioner from being held to an unfamiliar standard of care.[165]

There are, however, several problems with characterizing the state as the locality of practice. In a sparsely populated state like North Dakota, practitioners may be reluctant to testify against each other, continuing the same "conspiracy of silence" that weakened the basic locality rule.[166] Second, although the courts that have adopted this rule state that the standards of practice do not differ between the communities within the state,[167] many states have both rural and metropolitan areas where the location of practice may have an effect on the quality and character of advocacy.[168] Finally, there is the possibility that limiting the standard of care to the state may foster an unacceptably low level of performance in certain areas of the law.[169] It is plausible that in some areas of law, all the lawyers in a given state may lack the necessary skill, knowledge, and experience to handle a case properly.[170] If

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Id. at 60. The result in *Gleason* illustrates how important local rules, customs, and practices are when judging the conduct of an attorney. Therefore, if testimony by an expert witness from a foreign locality is used to establish the standard of care, the result may be unjust.

161. For a discussion of jurisdictions using the state as the locality of practice, see *supra* note 107.

162. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 336-37. The authors consider the state or jurisdiction the most logical geographical limitation for the standard of care for lawyers. *Id.* at 336. They emphasize that the "degree of care should be the same throughout the jurisdiction which qualifies and licenses attorneys. . . ." *Id.* at 337.

163. Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, __, 438 P.2d 865, 866-67 (1968). The Supreme Court of Washington reasoned that all attorneys within its jurisdiction are licensed by the state and are thus subject to minimum and standardized qualifications. *Id.*

164. Note, *supra* note 14, at 406-07.

165. *Id.*

166. *See id.* at 405-06.

167. *See Cook*, 73 Wash. 2d at __, 438 P.2d at 866; RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965).

168. Gillen, *supra* note 114, at 290 (characterization of the locality of practice as the entire state is too broad, ignoring such important factors as specialization, access to resources, and experience).

169. Note, *supra* note 14, at 406-07.

170. *Id.*

such were the case, testimony by a lawyer practicing in that state as to the standard of care in a similar situation would serve to perpetuate an unacceptably low level of legal service.[171].

4. *"Under Similar Circumstances" Variation*

The "under similar circumstances" standard is included as a geographical limitation on a lawyer's standard of care because the location where an attorney practices may be a relevant circumstance in determining the appropriate standard of care.[172] A District of Columbia court provided a typical formulation of this element, stating: "[A] lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances."[173] When applying a standard of care which includes a "similar circumstances" element, a court may consider circumstances such as locality, custom, special skills, and other relevant factors within the facts of the case which may have influenced the attorney's conduct.[174] Some courts include a "similar locality or community" element with the "similar circumstances" element.[175] In addition, a few courts have combined the "similar circumstances" element with both a "similar locality or community" element and a specialization element.[176] The inclusion of such combinations of limiting factors in the standard of care for lawyers is an attempt by the courts to fashion a standard that is as objective and specific to the facts of the case as possible.[177]

Although the "similar circumstances" rule is much broader than the basic locality rule and may include non-geographical fac-

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171. *Id.* at 407.

172. R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318, § 254, at 334 (locality, custom, and special skills are similar circumstances).

173. O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (quoting Morrison v. MacNamara, 407 A.2d 555, 561 (1979)).

174. *See* Note, *supra* note 14, at 415. The Note formulated a hypothetical standard of care which included the relevant circumstances from the facts of Russo v. Griffin, 147 Vt. 20, 510 A.2d 436 (1986):

> Attorney Griffin should have exercised the knowledge and skill ordinarily possessed by attorneys advising a family held business on how to structure a corporate buy out when one of the parties wishes to sell his or her interest in the corporation in order to start a new, but different, business venture in the same community.

Note, *supra* note 14, at 415; *see Russo*, 147 Vt. at __, 510 A.2d at 439.

175. *See, e.g.*, Rorrer v. Cooke, 313 N.C. 338, __, 329 S.E.2d 355, 366 (1985) (standard is that of members of profession in same or similar locality under similar circumstances).

176. *See, e.g.*, Bent v. Green, 39 Conn. Supp. 416, __, 466 A.2d 322, 325 (1983) (level of duty was to exercise the same degree of care, skill, and diligence which other attorneys in the same or similar locality, and in the same line of practice, would have exercised under similar circumstances).

177. *See* Note, *supra* note 62, at 775-76 (standard of care must be particularized to specific facts of each case).

tors, this element in the standard of care originated to alleviate the same problems that spawned the locality rule:[178] 1) the need for services under circumstances over which a lawyer has no control; and 2) circumstances which a lawyer must be familiar with in order to practice effectively.[179] In addition, the "similar circumstances" standard serves to protect both the practitioner and the public by making the standard of care for lawyers more specific, objective, and fair.[180]

There are real differences between a rural and an urban practice which result from circumstances which the profession has little power to change.[181] A rural attorney may not have the research and financial resources available to him or her that an attorney in a large metropolitan firm enjoys.[182] Rural lawyers are often sole practitioners or are members of small firms in communities where there are few other lawyers, and therefore, they have little opportunity to specialize.[183] The "similar circumstances" element therefore recognizes that circumstances such as available resources and specialization may be relevant to determining the requisite standard of care.[184]

The "similar circumstances" element, like the locality rule, also serves to protect rural lawyers from an unreasonably high standard of care by taking into consideration the quasi-emergency circumstances under which a rural lawyer may have to practice.[185]

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178. Note, *supra* note 14, at 414-15, 417 (addition of similar circumstances element to standard of care provides the same protection as the locality rule without the adverse side affects).

179. *Id.* at 417. The commentator explains how the addition of the "similar circumstances" element makes the law more fair to both practitioners and clients by allowing courts to tailor the standard of care to fit each case. *Id.* The commentator stated:

> Because it focuses on reasonable conduct under the circumstances, the ["similar circumstances"] standard of care does not prejudice general practitioners by subjecting them to a standard which compares their conduct to that of a legal specialists. . . .
>
> . . .If the attorney's conduct giving rise to the malpractice suite involves the application of a local or state substantive or procedural rule, then that "circumstance" would necessarily limit the available experts to those attorneys who are familiar with the rule.

Id.

180. *Id.* at 418 ("[similar circumstances] standard facilitates the adoption of a standard which is national in scope yet fair to the local bar, because it limits expert testimony to attorneys familiar with legitimate local differences").

181. HOUSTON CONFERENCE, *supra* note 23, at xiii ("urban bar and the communities of rural practitioners differ profoundly").

182. Gillen, *supra* note 114, at 290.

183. D. MEISELMAN, *supra* note 86, § 2:11, at 35.

184. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 337. The authors states that, in a sense, "locality is no different than custom or specialization, which are appropriately treated as. . .'similar circumstances'." *Id.*

185. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318; MODEL RULES, *supra* note 20, Rule 1.1 comment (1984). The comment to Model Rule 1.1 states that in an emergency,

Rural lawyers may not have the necessary experience to handle certain types of cases and may have little time, money, or opportunity to learn new methods.[186] If a rural lawyer declines such a case, the client may be without legal services. If a referral to a more qualified lawyer is possible, the rural lawyer loses a potential source of income.[187] Consequently, if a lawyer practicing in a rural community cannot earn an adequate living, he or she may leave the community.[188] The decision courts must ultimately make is whether less than adequate legal services are better than none at all.

Lawyers must also be familiar with certain circumstances such as the rules, customs, and characteristics specific to the area in which they practice in order to provide competent services.[189] The original locality element of the lawyer's standard of care not only protected rural attorneys, but also created a special duty for all lawyers:[190] All attorneys are required to be familiar with the factors peculiar to the localities where they practice.[191] The "similar circumstances" element serves this same purpose because the rules, customs, and characteristics of a particular locality may dif-

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a lawyer may provide services concerning a matter in which the lawyer is not completely competent to act upon if referral, association, or consultation with a more qualified lawyer would be impractical. *Id.*

186. *See* Chaplin, *The Structure of Legal Specialization in the 1980s*, HOUSTON CONFERENCE, *supra* note 23, at 349, 383-84 (1981) ("prior experience in performing a given lawyering task in a complex area of the law may often be essential to competent performance"); *see also id.* at 379 (factors to be considered in undertaking employment in an area where one is not already qualified include preparation, time, and cost).

187. ABA, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE GENERAL PRACTITIONER AND THE ORGANIZED BAR 34 (1984) [hereinafter TASK FORCE ON THE GENERAL PRACTITIONER]. The report stated: "There is a belief that many general practitioners are reluctant to limit their practice to areas in which they are proficient because, simply put, they need the money." *Id.*

188. *Cf.* J. ELWELL, *supra* note 41, at 22. The author of this 1881 medical malpractice treatise stated that in isolated communities in rural states, medical aid was difficult to obtain and thus, "the inexperienced and the unlearned attend to the surgery. . .or it is not attended to at all." *Id.* The Model Code discouraged referrals by inhibiting fee splitting. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 34; MODEL CODE, *supra* note 20, DR 2-107(A). The Model Code only allowed the division of fees in proportion to the services performed and responsibility assumed by each attorney. *Id.* This problem has been alleviated somewhat in states that have adopted the Model Rules, where fees may be divided, with the consent of the client, in any way the associating attorneys like, as long as each attorney assumes joint responsibility for the services. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 35; MODEL RULES, *supra* note 20, Rule 1.5(e).

189. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334. For a discussion of jurisdictions specifically recognizing the need for an attorney to be familiar with local rules and procedures, see *supra* note 117 and accompanying text; *see also* Gillen, *supra* note 114, at 290 ("[w]hat constitutes customary legal practice varies not merely with resources and opportunities available to the attorney but also from one community to another").

190. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334.

191. *E.g.*, Gabbert v. Evans, 184 Mo. App. 283, __, 166 S.W. 635, 638 (1914) (attorney must be acquainted with statutes and settled rules of law and practice in the locality in which he or she practices, and is responsible for loss to his or her client resulting from ignorance thereof).

fer from those in another, and therefore may be circumstances relevant to defining the standard of care for a particular case.[192]

The "similar circumstances" formulation is not a new concept,[193] but it has been recently promoted by commentators as a model for adoption by the courts.[194] Perhaps a more specific rule, which might include a geographical limitation such as "in the state" or "in similar communities," is necessary to remind courts that where an attorney practices may affect his ability to perform.[195] Adding the words "under similar circumstances" to the general standard of care for lawyers may not really change the way a court views an attorney's performance, but it is merely a call for sound legal reasoning — the process of applying the appropriate rules to all of the relevant facts.[196]

5. *Special Standards for Specialists*

Some states hold specialists to a higher standard of care, requiring those lawyers who accept work in a specialized area of the law or hold themselves out as specialists, to exercise the degree of skill and knowledge possessed by other specialists in that particular area of law.[197] There is nothing geographical about a higher

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192. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318.

193. *See* Meagher v. Kavli, 256 Minn. 54, 57, 97 N.W.2d 370, 373 (1959) (lawyer's professional conduct in representing his client is appraised in light of all circumstances); Olson v. North, 276 Ill. App. 457, 485 (1934) (expert opinion is allowed to determine if a defendant's action was the same as other reputable lawyers would have pursued under like circumstances).

194. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 251, at 318, § 254, at 337; Note, *supra* note 14, at 414-18.

195. *See* Note, *supra* note 62, at 782 ("[b]y omitting the locality of practice element, courts may overlook differences in resources and opportunities for experience among attorneys in widely varying communities.").

196. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (a fair assessment of an attorney's conduct must be done from the defendant attorneys' perspective in light of the circumstances to eliminate the distorting effects of hindsight). For the standard of care to be fair and effective, it must be carefully applied to the specific factual situation of the case. Note, *supra* note 62, at 775-76. Therefore, it is important that the standard of care include language which demands that the fact-finder consider all of the relevant circumstances which affected the defendant attorney's conduct. *Id.*

197. *See* Wright v. Williams, 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194, 199 (1975) (specialist in maritime law must exercise the same degree of care exercised by other specialists of ordinary skill and capacity specializing in the same field); Bent v. Green, 39 Conn. Supp. 416, __, 466 A.2d 322, 325 (1983) (taxation and financial planning specialist had duty to exercise same degree of care which other attorneys in the same line of practice would have exercised); O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (those with special training and experience must adhere to the standard of conduct commensurate with such attributes); Bowman v. Doherty, 235 Kan. 870, __, 686 P.2d 112, 120 (1984) (negligence is judged by the professional standards of the particular area of the law in which the practitioner is involved); Fishman v. Brooks, 396 Mass. 643, __, 487 N.E.2d 1377, 1379 (1986) (attorney who has not held himself out as a specialist owes his client the duty to exercise the degree of care and skill of the average, qualified practitioner); Procanik v. Cillo, 206 N.J. Super. 270, __, 502 A.2d 94, 103 (1985) (specialist has a multi-tier standard of duty); Rodriguez v. Horton, 95 N.M. 356, __, 622 P.2d 261, 264 (1980) (lawyer holding himself out

standard of care for specialists. Nevertheless, applying higher standards to specialists serves as a type of locality rule because it is designed to serve a similar purpose — protecting rural attorneys from an unreasonably higher standard of care.[198] In general, rural lawyers are, by necessity, general practitioners, whereas urban lawyers often have a greater opportunity to specialize.[199] Both the locality and specialist standards protect the practitioner who has fewer resources and opportunities from being held to an unrealistic level of skill, while still protecting consumers by holding the practitioner with superior skills, experience, resources, and opportunities to the level of care he or she professes to possess.[200]

In medical malpractice cases, there is a trend toward abandoning the locality rule in favor of different standards for generalists and specialists.[201] The specialist/generalist dichotomy is a more specific and accurate method to categorize different groups within a profession.[202] Nevertheless, such a standard does not take into account circumstances that may be important in a legal mal-

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as specialist must exercise the same skill as other specialists of ordinary ability in the same field); Walker v. Bangs, 92 Wash. 2d 854, __, 601 P.2d 1279, 1283 (1979) (one who holds himself out as a specialist will be held to the standard of performance of other specialists in that same area); *see also* LAWYERS' MANUAL, *supra* note 2, at 21:4001 (ABA has taken the position that regulation of specialists is the province of the states).

198. R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 328 ("[r]ecognition of speciality considerations is similar to recognition of locality considerations"). *Cf.*, Gillen, *supra* note 114, at 290. Gillen states:

> A community standard has a pragmatic rationale. By omitting this factor, courts may overlook differences in admission requirements, resources and opportunities. *The obvious specialization in metropolitan areas compared with the more generalized practice in rural areas* supports this criteria's validity.

Id. (emphasis added).

199. *See* TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 16-17. Most people perceive urban lawyers as large firm specialists and rural lawyers as solo general practitioners. *Id.* Even though most solo practitioners actually practice in cities, solo and small firm practices are more likely than large firms to be located in a rural setting. *Id.*

200. R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 328.

201. Annotation, *Modern Status of "Locality Rule" in Malpractice Action Against Physician Who is Not a Specialist*, 99 A.L.R.3d 1133, 1138, 1151 (1980). The annotator substantially concluded that factors such as improved education, transportation, and communication have promoted a recent trend for courts to recognize a standard of care that is uniform across the nation, with a typical rule being: "[A] physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances." *Id.* at 1151. *Cf.* Robbins v. Footer, 553 F.2d 123, 129 (D.C. Cir. 1977) ("[i]t seems clear that the medical profession itself has adopted a national standard for membership in one of its certified specialties"). The court in *Robbins* noted that "[i]f the law remains tied to a locality standard, it ignores the reality of modern medicine in favor of an outdated mythology." *Id.* at 129.

202. *See* Hirschberg v. State, 91 Misc. 2d 590, __, 398 N.Y.S.2d 470, 474-75 (N.Y. Ct. Cl. 1977) (court abandoned the locality rule because it was an obsolete and imprecise method to define the standard of care). The court in *Hirschberg* recognized that "[t]he more progressive principle adopted in sister states places the emphasis upon professional proficiency rather than geographical proximity." *Id.* at __, 398 N.Y.S.2d at 475.

practice case such as the local rules, customs, and characteristics of the community where the professional practices.[203]

As previously stated, one of the original reasons why the locality rule was applied to professional malpractice was to protect rural practitioners from being held to an unreasonably high standard of care.[204] Before the development of sophisticated communication, transportation, and research systems, a rural lawyer was truly isolated from the centers where law and practice methods were advancing.[205] Therefore, the protection provided by the locality rule was justified. However, the original rationale for the locality rule of protecting the rural lawyer is no longer as persuasive as it once was.[206] Today, when a rural lawyer has a legal question, he can commission a legal research company, tap into a computer database using long distance lines, or call an attorney who specializes in such cases.[207] In addition, the rural lawyer can computerize his or her office practice relatively inexpensively.[208] Furthermore, there are an unlimited supply of resource materials available.[209] Therefore, the original problems which prompted the creation of the locality rule have in many ways been alleviated.

There may still exist, however, a basis for the distinction between a rural and metropolitan attorney.[210] In most cases, the rural attorney is a solo or a small firm practitioner.[211] A rural attorney may be limited by economics because often, he or she is one of the only lawyers in town, and thus must be a general practitioner to make a living. As a small firm or solo practitioner, the rural attorney does not have the time, money, or energy to be a master in every area of the law.[212] It is also likely that he or she lacks the

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203. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334.

204. RESTATEMENT (SECOND) OF TORTS § 299A comment g (1965). For the pertinent excerpt from the Restatement, see *supra* note 42.

205. *See* Pitt v. Yalden, 98 Eng. Rep. 74, 75 (K.B. 1767) (they were country attorneys and probably did not know that the issue was settled).

206. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 333-34.

207. D. MEISELMAN, *supra* note 86, at 35 (contemporary systems of communication and legal education are clearly improved over past means of exchanging information); *cf. Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, __, 349 A.2d 245, 249 (1975). For the pertinent quotation from *Shilkret*, see *supra* note 53.

208. Mazza, *Chipping Away at Computer Resistance*, 2 COMPLEAT LAWYER 10-14 (Winter 1985).

209. Kregel & Crowther, *Win With the Right Library Services*, 1 COMPLEAT LAWYER 18, 20 (Fall 1984).

210. HOUSTON CONFERENCE, *supra* note 23, at xiii ("urban bar and the communities of rural practitioners differ profoundly").

211. *See* TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 16-17 (solo and small firm practices are more likely than large firms to be located in rural setting). For a discussion of rural lawyers in North Dakota, see *infra* notes 244-295 and accompanying text.

212. Chaplin, *supra* note 186, at 379 (three factors which are to be considered in undertaking employment in an area where one is not already qualified are preparation,

financial resources or the support staff to handle complex litigation. In addition, the rural attorney may not have the big client to provide a steady and certain cash flow. Therefore, an important distinction between a rural and metropolitan lawyer is that the rural attorney does not have as great an opportunity to specialize as does a metropolitan attorney in a medium to large firm.[213] Consequently, due to the economics of a rural practice, where a lawyer practices is still a distinguishing characteristic.[214]

Specialization among lawyers is becoming increasingly common.[215] Nevertheless, official recognition that certain lawyers are specialists has been resisted by a large portion of the profession.[216] Only twelve states currently have legislative programs for official recognition of specialists in various areas of the law.[217] Unlike the

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time, and cost); *see also*, Chaplin, *The Dilemmas of Specialization*, HOUSTON CONFERENCE, *supra* note 23, at 304, 311-12. The author explains how difficult it is to be a general practitioner:

> It is becoming more and more common for lawyers to affiliate themselves in larger and larger law partnerships organized along fairly rigid department lines such as litigation, tax, estate planning and probate, corporate, and real estate. There is simply too much information and practical experience to be obtained in each of these areas to make it efficient, let alone cost-effective, for a lawyer to handle competently more than the most mundane problems in more than a very few areas of practice at any given time.

Id. at 311.

213. *See* L. PATTERSON AND E. CHEATHAM, THE PROFESSION OF LAW 249-50 (1971). The authors explain why a solo or small firm may be at a disadvantage in modern legal practice. According to Patterson and Cheatham, a lawyer presented with a case which he or she is not competent to handle has three options. *Id.* at 249. One, he or she can decline the case, but this is inconvenient for the client and unprofitable for the attorney. *Id.* Two, he or she can accept the case and become competent through study. *Id.* This option is time-consuming and costly. Third, he or she can accept the case, and with his client's consent, associate a specialist. *Id.* For large law firms, Patterson and Cheatham recognize that the last option is quite workable because they have the luxury of having in-house specialists. *Id.* The authors conclude: "The lawyer practicing alone or in a small firm has no such self-sufficient competence. He must go outside if his clients are to be adequately represented." *Id.* This situation is common for rural lawyers. *See* D. MEISELMAN, *supra* note 86, § 2:11 at 35 (contemporary systems of communication and legal education are clearly improved over past means of exchanging information, but specialization is still far more common in metropolitan areas than in rural areas).

214. *Cf.*, HOUSTON CONFERENCE, *supra* note 23, at 233. In her statement, Alice Daniel, Professor of Law, Georgetown University, emphasized: "We must not impose "big firm" standards on the practitioner who has far fewer resources available. We must not define competence too expensively." *Id.*

215. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 325 (many attorneys have become specialists).

216. *See* Chaplin, *supra* note 186, at 374 ("most lawyers will readily agree that most of the opposition to formal recognition of specialists comes from the sole practitioners and small law firms"). General practitioners are the core of the legal profession. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 1. They outnumber every other segment of the estimated 649,000 lawyers in the United States. *Id.*

217. LAWYERS' MANUAL, *supra* note 2, at 21:4001 (twelve states had specialist certification plans by 1983: Arizona, Arkansas, California, Florida, Iowa, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah); R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 324 (an increasing number of states recognize specialists under state bar certification); *see also*, R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 330

medical profession, there is no national program for certification of specialists, other than patent, trademark, and admiralty law.[218] Due to the increasing complexity of the law, however, unofficial specialization often occurs without official recognition.[219] As a result, courts may be reluctant to hold specialists to a higher standard of care, because without official standards by which to measure the qualifications of a specialists, identifying a specialty and fashioning a standard of care on a case by case basis is a demanding and uncertain process.[220]

The medical profession has dealt with the problem of competence by abandoning the locality rule and adopting a national system of accreditation according to area of expertise.[221] As progressive as the medical profession is in this area, however, the system is not without problems of its own, such as a lack of integration and geographic maldistribution, compounded by a shortage of generalists.[222] Although legal specialization is not as developed,

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("[t]he task of cataloging specialties must be done on a case by case basis by the court considering such recognition or certification as exists by the state bar, the American Bar Association, lawyers' organizations, and. . .the legal community.").

218. LAWYERS' MANUAL, *supra* note 2 at 21:4001. The ABA asserts that recognition and regulation of specialists is the province of state entities that regulate the practice of law, and that the lawyers' participation in such plans should be voluntary. *Id.* In 1979, the ABA adopted the Model Plan of Specialization which is intended for potential adoption by the states. *Id.* at 01:5201. The LAWYERS' MANUAL provides a brief synopsis of the Model Plan's principles:

> It is voluntary; it sets minimum standards that must be met by a lawyer seeking to be recognized as a specialist and to hold himself out as such, while allowing for adoption of higher standards for any given speciality; it does not require examinations, but leaves the states the option of requiring examinations for any or all specialties; it safeguards the right of specialists and nonspecialists alike to practice in any field of law; it is administered by a board appointed by the state's supreme court; it provides for input from nonlawyers; and it names participants in the plan as the sole source of financing for the plan.

Id. at 21:4007. Both the Model Code and the Model Rules allow lawyers to hold themselves out as specialists in the fields of admiralty, trademark, and patent law, without state controls, where a holding out as a specialist has been historically permitted. MODEL CODE, *supra* note 20, DR 2-105; MODEL RULES, *supra* note 20, Rule 7.4.

219. LAWYERS' MANUAL, *supra* note 2, at 21:4003. The editors noted that "[b]oth before and while the merits. . .of recognition and regulation of specialization have been debated. . .in the ABA and in the states, de facto specialization by lawyers has flourished." *Id.* (quoting Special Committee on Specialization and Specialized Legal Education, *1954 Midyear Report*, 79 ABA REPORTS 582, 584 (1954)) (due to the complexity of the law and demand for experts, lawyers have been limiting their practice to specific areas of law, especially in the last ten years).

220. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 330-31.

221. For a discussion of the uniformity of medical standards now existing across the nation, see *supra* note 54 and accompanying text.

222. Tarlov, *Credentialing: Natural Evolution of the Medical Profession*, HOUSTON CONFERENCE, *supra* note 23, at 406, 414. Tarlov stated that specialization has undesirable side effects. *Id.* Unlike general practitioners, Tarlov noted that specialists often do not have a genuine concern for each individual patient, and often are most zealous only when an unusual case arises. *Id.* Consequently, Tarlov believed that most medical services should be handled by generalists, and since there was a shortage of generalists and a surplus of specialists, a definite problem existed. *Id.* In addition, Tarlov recognized that specialists

potential problems with specialization as applied to the legal profession have been identified.[223] For instance, the general standard of care calls for lawyers to possess a reasonable level of skill and knowledge and to exercise a reasonable degree of care.[224] While specialization functions to increase an attorney's level of skill and knowledge, it may have little effect on the degree of care he or she in fact exercises.[225] Therefore, a specialist may be just as likely to make an error due to lack of care, i.e., negligence, as would a general practitioner.[226] Perhaps the uniformity that would accompany the application of national standards to the legal profession is not, at present, in the best interests of the profession due to the variation of rules, laws, and customs among the jurisdictions.

Rural lawyers and small firm general practitioners in urban areas also suffer the same lack of opportunity to specialize, thereby putting them at a disadvantage when held to the same standard of care as large firm lawyers from urban areas.[227] Large firm lawyers have the opportunity to limit their practice to certain areas, allowing them to conserve time, money, and energy.[228] Until recently, specialization was rarely an issue concerning the standard of care in legal malpractice cases.[229] The courts, however, have begun to hold those who represent themselves as specialists to a higher standard of care; however, it is not yet a majority rule.[230] The adoption of a higher standard of care for specialists by the courts may achieve the same end as the original locality rule —

require a large population base. *Id.* Therefore, Tarlov concluded that a geographic maldistribution of physicians' services has resulted, with a concentration of physicians in metropolitan areas. *Id.*

223. D. MEISELMAN, *supra* note 86, at 26-27. Meiselman stated that specialization may not guarantee quality services since many errors are due to carelessness rather than lack of knowledge. *Id.* at 26. As an example, Meiselman stated that certified specialists are just as likely to miss a statute of limitations or fail to examine title to realty as is a general practitioner. *Id.* Therefore, Meiselman concluded that a specialization standard may actually increase malpractice suits by raising the expectations of the public. *Id. Cf.* LAWYERS' MANUAL, *supra* note 2, at 21:4004 (there are many unresolved issues concerning legal specialization).

224. *See, e.g.*, O'Neil v. Bergan, 452 A.2d 337, 341 (D.C. 1982) (lawyer must exercise reasonable care and skill).

225. D. MEISELMAN, *supra* note 86, at 26. For a discussion of Meiselman's assertion, see *supra* note 223.

226. *Id.*

227. *See* MELONE, BRAUD & OUGH, NORTH DAKOTA LAWYERS: MAPPING THE SOCIO-POLITICAL DIMENSIONS 3 (1975) ("greater opportunity to specialize seems to be the best factor in explaining this difference between firm and solo practitioners").

228. L. PATTERSON AND E. CHEATHAM, *supra* note 213, at 249-50 (large law firms have the luxury of having in-house specialists).

229. R. MALLEN & V. LEVIT, *supra* note 5, § 253, at 328.

230. D. MEISELMAN, *supra* note 86, at 24. Meiselman notes: "As with medical malpractice cases involving specialists one would reasonably anticipate that the specialist in a particular field of legal practice is held to a higher standard than the general practitioner. However, this idea has yet to be accepted as established principal." *Id.*

protecting those with fewer resources and opportunities (generalists) from being held to the same standard as those who have greater resources and opportunities (specialists).[231]

Some courts have combined some of the geographical limitations with those discussed above to fashion a very specific standard of care.[232] The Washington Supreme Court included a geographical limitation and a higher standard for specialists in the standard of care for lawyers to make the standard more specific.[233] The Washington rule designates the state as the locality of practice, in addition to differentiating between general practitioners and specialists.[234] This combination serves to provide a uniform standard across the state, preventing pockets of incompetency from developing.[235] The effect of such a formulation is similar to that of the basic locality rule, in that it protects rural lawyers, who are most often general practitioners, from being held to the same standard of care applied to specialists.[236] Furthermore, the "in the state" and "specialists" standard combination does not limit expert witnesses to those who practice in the same community or county as the defendant as does the basic locality rule.[237] Finally, the "in the state" element of this combination prevents the importation of expert witnesses from foreign jurisdictions who may expound a standard of care of which the defendant attorney is unfamiliar.[238] Therefore, combining a geographical limitation with a specialist standard may give courts the necessary flexibility to handle legal

231. *See* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 332-33. Mallen and Levit emphasize that rural attorneys should not be given special treatment. *Id.*, § 254, at 334. They also state that local customs should not dictate the degree of skill, knowledge, and care required. *Id.* In order to alleviate the possible unfairness of a uniform standard, Mallen and Levit advocate that rural lawyers who cannot specialize be held to the standard of care as general practitioners and that urban lawyers who specialize should be held to the higher degree of skill, knowledge, and care that they profess to possess. *Id.*

232. *See* Bent v. Green, 39 Conn. Supp. 416, __, 466 A.2d 322, 325 (1983) (in the same or similar locality, in the same line of practice, and under similar circumstances); Rorrer v. Cooke, 313 N.C. 338, __, 329 S.E.2d 355, 366 (1985) (in the same or similar locality under similar circumstances); Lenius v. King, 294 N.W.2d 912, 913 (S.D. 1980) (same type of practice in the same or similar locality under similar circumstances).

233. *See* Walker v. Bangs, 92 Wash. 2d 854, __, 601 P.2d 1279, 1282-83 (1979) (lawyer is held to the degree of care and skill possessed by a reasonable lawyer in this jurisdiction; one who holds himself out as specialist will be held to standard of care of other specialists in that area).

234. *Id.*

235. See R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 336.

236. *Cf.* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334 (attorney from a small community, who of necessity must generalize his or her practice, ought not be compared with a metropolitan attorney who limits his or her practice to one area of law).

237. *Cf.* R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 337 ("[b]y adopting a statewide standard of care, it is unnecessary to inject locality into the instructions given to the jury. . . .").

238. *See* Note, *supra* note 14, at 406 (statewide standard of care limits outside expert testimony).

malpractice actions, while remaining "fair" to the practitioners within the given geographical area.

B. SUMMARY OF THE VARIOUS STANDARDS UTILIZED BY COURTS IN LEGAL MALPRACTICE ACTIONS

As illustrated by the above analysis, it appears that courts have several options for tailoring a more specific standard of care for lawyers. There are, however, numerous variations to this general rule which make the standard more specific. Initially, a court may prefer to use a general standard containing no limiting factors as a method for encouraging uniformity in the standard of care.[239] A court can then add geographical elements such as "in the locality," "in a similar locality or community," or "in the state" to the general rule.[240] Courts can also choose a very broad limiting element such as "under the circumstances," which may include geographical factors, to particularize the standard of care for lawyers.[241] Furthermore, courts can distinguish between lawyers with different levels of skill by holding specialists to a higher standard of care than general practitioners.[242] As a final alternative, a court can apply a standard of care which contains a combination of limiting factors to fashion a very specific standard of care.[243] Therefore, a court has the ability to fashion a standard which it believes will give them the necessary flexibility, while remaining fair to the attorneys subject to the rule.

It is not the objective of this Note to judge which geographical element, if any, is the best, since each has its advantages and disadvantages depending on the nature of the jurisdiction and the circumstances of each case. The next section will illustrate how courts can choose the appropriate formula to fit the needs of a jurisdiction. Rather than attempt to apply every geographical limitation to all demographic possibilities, the following section will use the legal profession of North Dakota as a model, and attempt to fashion a formula most suitable to this state's needs.

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239. For a discussion of jurisdictions utilizing a general standard of care, see *supra* note 94 and accompanying text.

240. For a discussion of the basic locality rule, see *supra* notes 112-26 and accompanying text. For a discussion of the "similar locality or community" element, see *supra* notes 127-60 and accompanying text. For a discussion of the "in the state or jurisdiction" element, see *supra* notes 161-71 and accompanying text.

241. For a discussion of the "under the circumstances" element see *supra* notes 172-96 and accompanying text.

242. For a discussion of the specialists standard, see *supra* notes 197-231 and accompanying text.

243. For a discussion of jurisdictions which have combined a number of elements to create a specific standard of care, see *supra* notes 175-76, 232-38 and accompanying text.

IV. NORTH DAKOTA AS A MODEL FOR ANALYZING GEOGRAPHICAL VARIATIONS OF THE LOCALITY RULE

A. PROFILE OF NORTH DAKOTA AND ITS LEGAL SYSTEM

North Dakota is generally considered a rural state,[244] yet it contains three standard metropolitan statistical areas (SMSAs).[245] This contrast makes North Dakota a useful model to demonstrate how various geographical limitations of the general standard of care can affect the legal profession.[246] This section will attempt to apply several geographic limitations to the standard of care for lawyers in light of the demographics of the legal profession in North Dakota. Unfortunately, there is very little statistical information available in North Dakota on legal malpractice.[247] Fur-

244. UNIVERSITY OF NORTH DAKOTA BUREAU OF BUSINESS AND ECONOMIC RESEARCH & NORTH DAKOTA OFFICE OF INTERGOVERNMENTAL ASSISTANCE, STATISTICAL ABSTRACT OF NORTH DAKOTA 8 (2d ed. 1983) (hereinafter STATISTICAL ABSTRACT). In 1980, of the 652,717 persons residing in North Dakota 51% were classified as rural and 49% were classified as urban. *Id.* The STATISTICAL ABSTRACT defines rural as "[p]ersons living in areas with less than 2,500 population." *Id.* The source for the STATISTICAL ABSTRACT data on the urban-rural composition of North Dakota is the U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION (1980). STATISTICAL ABSTRACT at 8. The percentage of rural population in North Dakota has been steadily declining since the first census in 1870. *Id.* In 1870, North Dakota was 100% rural; in 1920, 86% rural; in 1950, 73% rural; and in 1980, North Dakota's population was 51% rural. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION (various years). Thus, it is highly likely that by 1988, North Dakota has become an urban state. Nonetheless, it may be safely stated that North Dakota is one of the most rural states in the nation.

245. B. CURRAN, A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 238, 242 (1985) [hereinafter STATISTICAL PROFILE]. A Standard Metropolitan Statistical Area (hereinafter SMSA) is a geographic area designated by the U.S. Office of Management and Budget. BUREAU OF THE CENSUS, 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 888 (107th ed. 1986). The definition of an SMSA is, "one of a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus." *Id.* For a geographic area to qualify as an SMSA, it must include: 1) one city of 50,000 or more, or 2) a Census Bureau defined urban area of at least 50,000 and a total SMSA population of at least 100,000 (75,000 in New England). *Id.*

246. North Dakota's population is about half rural and half urban. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS POPULATION (1980). Therefore, it would seem likely that there is a fairly substantial percentage of the legal profession that practices in rural areas, as well as a substantial percentage that practice in cities. Thus, because North Dakota continues to have a substantially agrarian economy and culture, perhaps the factors that supported the basic locality rule still exist in this state. Lawyers practicing in rural areas may not have the resources or opportunities to gain experience that their urban counterparts enjoy. This is the starting premise for this section, based on these general assumptions.

247. State statistics on legal malpractice in North Dakota are unavailable. A survey of North Dakota cases at the appellate level also does not provide an accurate profile of legal malpractice cases since many cases that go to trial are never appealed. More importantly, the bulk of legal malpractice claims never even go to trial, but rather are settled out of court. North Dakota does, however, have a statute which requires insurance companies to file reports on all legal malpractice claims, but the insurance companies do not substantially comply with the law. *See* N.D. CENT. CODE § 26.1-01-06 (Supp. 1987) (professional liability insurance carriers required to file reports for each claim). Insurers did submit 15 report forms to the North Dakota Insurance Department in 1986, but most are substantially

thermore, some of the North Dakota statistics are more than ten years old.[248] Therefore, for the purpose of this Note, national statistics of the legal profession will at times be substituted for analytical comparison.[249]

While North Dakota is usually considered a rural state, most lawyers are in fact located in cities.[250] Therefore, the small-town lawyer is not the norm.[251] However, what is considered a city in North Dakota, a population of 10,000 or more, may be only a town or suburb in a metropolitan state.[252] North Dakota has only three areas that are considered by statisticians as metropolitan areas. These areas are in the proximity of Fargo, Grand Forks, and Bismarck.[253] Only one of these cities, Fargo, has a population over

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incomplete. Letter from JoAnn Underwood, paralegal, N.D. Ins. Dept., to Dwain Fagerlund (Jan. 25, 1988) (enclosed legal malpractice claims reports).

The reasons for noncompliance with the statute may be that such information could be damaging to the reputation of individuals with claims against them, to the legal profession, or to the insurance industry. In addition, it may be that the state does not strictly enforce the statute because the insurance companies may threaten to pull out of a nominal state such as North Dakota, leaving practitioners with no insurance protection. Most insurance companies do, however, submit national statistics to the American Bar Association (ABA) on legal malpractice claims. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 1-2. Therefore, for purposes of this Note, inferences shall be drawn from national statistics for analysis of the North Dakota Bar because they are the only available source.

248. *See* MELONE, BRAUD & OUGH, *supra* note 227.

249. National statistics on legal malpractice will be taken from these sources: PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 20-22; STATISTICAL PROFILE, *supra* note 245, at 439-42, 554-55; B. CURRAN, THE 1985 SUPPLEMENT TO THE LAWYER STATISTICAL REPORT 4, 111-13 (1986) [hereinafter 1985 SUPPLEMENT]; TASK FORCE ON THE GENERAL PRACTITIONER *supra* note 187, at 7. Even on a national basis, it is difficult to compile statistics on legal malpractice claims. Until the ABA convinced a large group of insurance carriers that such statistics were valuable for loss prevention, the carriers were very uncooperative. *See* PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 1-2. The reporter of PROFILE OF LEGAL MALPRACTICE noted that insurance carriers were unwilling to disclose information to the customer-based Task Force on Legal Malpractice. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 1-2. The reporter also noted that the information that was available was very limited because it was organized by each carrier in an independent format, making aggregation and comparison impossible. *Id.* Even after extensive discussion and negotiation, the ABA could not get a compete consensus for cooperation by the insurance industry because two major insurers of large law firms did not report data to the ABA. *Id.* at 20.

250. MELONE, BRAUD & OUGH, *supra* note 227, at 1 ("two-thirds of the lawyers practice in the ten cities of 10,000 or more, containing only 56 percent of the state's population, but fewer than 7 percent practice in communities under 1,000 even though these areas contain over 18 percent of the total population").

251. MELONE, BRAUD & OUGH, *supra* note 227, at 1.

252. *Cf.* TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 18 ("small firm in an urban setting may be a large firm in a rural setting").

253. STATISTICAL PROFILE, *supra* note 245, at 439. The "standard metropolitan statistical areas" (SMSAs) in North Dakota include: a) Fargo-Moorhead/Cass and Clay counties, b) Grand Forks-East Grand Forks-Air Force Base/Polk and Grand Forks counties, and c) Bismarck-Mandan/Morton and Burleigh counties. *Id.* Note that the SMSAs do not include Minot, Jamestown, Dickinson, Williston, Wahpeton, Valley City, Devils Lake, or Grafton. *Id.* at 440. In 1980, these cities had the following populations: a) Minot-32,843; b) Jamestown-16,280; c) Dickinson-15,924; d) Williston-13,336; e) Wahpeton-9,064; f) Valley City-7,774; g) Devils Lake-7,442; and h) Grafton-5,293. 1987 WORLD ALMANAC AND BOOK OF FACTS 249 (1986). In 1980, 68% of the lawyers in North Dakota outside the SMSAs

50,000.[254] Thus, compared to a metropolitan state such as New York, even North Dakota's metropolitan lawyers are somewhat rural. Nevertheless, fifty-seven percent of the lawyers in North Dakota practice in the above-mentioned metropolitan areas.[255] Therefore, the majority of the lawyers in North Dakota do not practice in a rural setting.

Seventy-five percent of the lawyers in North Dakota are solo or small firm practitioners.[256] It is difficult for solo or small firm practitioners to limit their practices to one area of the law for economical reasons,[257] and thus, most North Dakota lawyers are probably general practitioners. In addition, small towns do not have the population base to support large firms or legal specialsts, and specialization is more common in metropolitan areas.[258] Therefore, it is probable that most rural North Dakota lawyers are solo or small firm general practitioners.[259] Furthermore, since most lawyers in North Dakota do not practice in small towns[260] or in large firms,[261] it is likely that most urban lawyers are solo or small firm general practitioners as well.

Another characteristic of the North Dakota legal profession is that one-half of North Dakota lawyers in private practice belong to

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(Bismarck-Mandan, Grand Forks-East Grand Forks-Air Force Base, Fargo-Moorhead) practiced in firms of three or less members. STATISTICAL PROFILE, *supra* note 245, at 442. Solo practitioners comprised 43% of this group and firms of two to three lawyers comprised 26%. *Id.* The rest of the lawyers practicing outside the SMSAs practiced in firms employing four to ten lawyers. *Id.*

254. STATISTICAL PROFILE, *supra* note 245, at 439.

255. *Id.* at 440.

256. 1985 SUPPLEMENT, *supra* note 249, at 112. Nationally, 49% of private practitioners are solo practitioners, 22% practice in firms of two to five, and 29% practice in firms of six or more. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 20. In North Dakota, 41% of the private practitioners are solo practitioners, 34% practice in firms of two to five, and 25% practice in firms of six or more. 1985 SUPPLEMENT, *supra* note 249, at 112. For purposes of this Note, a small firm is defined as a firm having two to five members. This corresponds to the categories used by the ABA Standing Committee on Lawyers' Professional Liability in PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 20.

257. L. PATTERSON AND E. CHEATHAM, *supra* note 213, at 249-50 (solo practitioner has little opportunity to specialize).

258. Gillen, *supra* note 114, at 290 (specialization is common in metropolitan areas compared with the more generalized practice in rural areas).

259. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 16-17. The report concluded that because definitions are ambiguous, urban lawyers are equated with a specialized practice and rural lawyers are equated with a general practice. *Id.* This definition does not account for the fact that the majority of solo practitioners practice in central cities. *Id.* Nevertheless, solo and small firm practices are more likely than large firms to be located in a rural area. *Id.*

260. MELONE, BRAUD & OUGH, *supra* note 227, at 1 ("two-thirds of the lawyers practice in the 10 cities of 10,000 or more, containing only 56 percent of the state's population, but fewer than 7 percent practice in communities under 1,000 even though these areas contain over 18 percent of the total population").

261. 1985 SUPPLEMENT, *supra* note 249, at 112. In North Dakota, 41% of the private practitioners are solo practitioners, 34% practice in firms of two to five, and 25% practice in firms of six or more. *Id.*

partnerships,[262] and thus have: a) the luxury of having other attorneys within their office to consult or associate with on the case; b) the opportunity to specialize somewhat; and c) an increased ability to pool capital for research resources, support staff, automated office equipment, and the ability to absorb initial discovery costs. The percentage of the partnership form of practice is significantly higher in North Dakota than it is nationally.[263] Furthermore, only a small percentage of the lawyers in North Dakota practice in a truly rural setting.[264] Moreover, in North Dakota, lawyers as a whole have relatively equivalent financial resources[265] and ability ratings, regardless of the size or location of their practice.[266] According to the statistics discussed above, it therefore appears that in North Dakota, most of the lawyers stand on similar footing. Therefore, the legal profession in North Dakota does not display the patterns of stratification that exist in metropolitan states.[267]

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262. 1985 SUPPLEMENT, *supra* note 249, at 112. Fifty-nine percent of North Dakota lawyers enjoy the partnership form of practice which allows the pooling of resources and limitation of practice to a narrower area of law. *Id.* at 112. Only 41% of the North Dakota private practitioners are solo practitioners. *Id.* at 112.

263. *Id.* at 4. Only 53% of lawyers at the national level practice in partnership compared to 59% in North Dakota. *Id.* at 112.

264. While two-thirds of the lawyers in North Dakota practice in citites of 10,000 or more, and only 7% of North Dakota's lawyers practice in communitites of 1,000 or less, statistics are not available for the number of lawyers that practice in communitites of more than 1,000, but less than 10,000. *See*, MELONE, BRAUD & OUGH, *supra* note 227, at 1 ("two-thirds of the lawyers practice in the 10 cities of 10,000 or more, containing only 56 percent of the state's population, but fewer than 7 percent practice in communitites under 1,000 even though these ares contain over 18% of the total population."). Thus, the available statistics may overstate the urban character of the legal profession in North Dakota.

265. MELONE, BRAUD & OUGH, *supra* note 227, at 7. ("North Dakota . . . solo practitioners do not differ from firm attorneys in their net worth").

266. *Id.* The authors noted:

> Ability ratings [from the Martindale-Hubbell Law Directory], like net worth, seem to bear little relation to style of practice, though a higher percentage [52%] of large firm attorneys have "A" ratings than do small firm attorneys [42%] and the differences are statistically significant. But the solo practitioners, with nearly 47 percent "A" ratings, are five percentage points above the small firm lawyers [42%] and five percentage points below the large firm members.

Id.

The author of this Note has reservations as to the research methods used by Martindale-Hubbell company to compile their ability ratings. Martindale-Hubbell uses a subjective questionnaire which is not distributed according to proper statistical methods. Unfortunately, there exist no better sources for such information.

267. MELONE, BRAUD & OUGH, *supra* note 227, at 3. The authors noted that "[t]he legal profession, like medicine, stratifies its members into differentiated classes." *Id.* The authors relied on statistics and conclusions by legal sociologist Jerome Carlin in stating that in metropolitan areas, solo practitioners are considered a lower class of lawyers because they come from less-advantaged backgrounds, attend less prestigious law schools, often have undistinguished academic records, deal with less desirable clientele, and earn less money performing the "dirty work" of the profession. *Id.* The authors compared the legal profession in North Dakota to the urban research and concluded that "[t]he style-of-practice figures point to a minimal amount of internal bar conflict in North Dakota." *Id.* at 4. The authors further stated that "there is a distinctive pattern of homogeneity among

In order to fashion a specific standard of care that serves the best interest of society and the legal profession, it is useful to pinpoint the group of lawyers most prone to allegations of malpractice. The available statistics do not distinguish lawyers according to the rural or urban character of their locality of practice. Therefore, it is necessary to analogize from statistics distinguishing lawyers on the basis of firm size. Comparison can then be made under the rough assumption that generally, most rural lawyers are general practitioners, while most specialists practice in metropolitan areas.[268]

B. NATIONAL STATISTICS

Although North Dakota statistics on legal malpractice are currently unavailable,[269] there are national statistics.[270] Therefore, when discussing legal malpractice in North Dakota, this Note will, of necessity, apply the national statistics on the legal profession.

According to the 1980 national statistics on the legal profession, solo practitioners make up 49% of all private practitioners, yet are responsible for only 35% of all legal malpractice claims.[271] Small firm lawyers, however, make up 22% of the private practitioners and are responsible for 44% of all legal malpractice claims.[272] Large firms comprise 29% of all private practitioners and account for only 22% of all claims.[273] Therefore, the ABA Standing Committee on Lawyers' Professional Liability, in its report titled *Profile of Legal Malpractice*, concluded that "firms of two to five lawyers produce a larger proportion of reported claims asserted against attorneys than would be explained by their frequency among all sizes of firms."[274] It is not clear, however, why small firms are more susceptible to legal malpractice claims than solo practitioners or large firms.[275]

North Dakota lawyers which differentiates them from the urban attorneys upon whom most research has heretofore been focused." *Id.* at 7.

268. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 16-17 (urban lawyers are equated with a specialized practice and rural lawyers are equated with a general practice).

269. For a discussion of the unavailability of the North Dakota legal malpractice statistics, see *supra* note 247 and accompanying text.

270. For various sources of national legal malpractice statistics, see *supra* note 249 and accompanying text.

271. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 20. This study incorporated general statistics on lawyers compiled in 1980. STATISTICAL PROFILE, *supra* note 245.

272. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 20.

273. *Id.* A problem with this statistic is that "[t]wo major insurers of large law firms have not reported data to the ABA." *Id.*

274. *Id.*

275. The reporter for the ABA study did not attempt to state the cause for the disparities based on firm size. *Id.* at 20.

Nationally, the statistics indicated the following types of malpractice claims: 1) substantive errors — 44%; 2) administrative errors — 26%; 3) client-related errors — 16%; 4) intentional malpractice — 12%; and 5) other errors — 2%.[276] The reporter for *Profile of Legal Malpractice* concluded that, "[i]n general, the frequency of administrative errors seems to decrease with [an increase in] firms size. . .[and] [t]he proportion of intentional wrongs increases steadily with firm size, reaching a maximum in large firms of nearly double the rate for all reported claims."[277] Within the other two categories, "substantive" and "client-related" errors, the percentage of all claims remained fairly consistent with each firm size.[278]

In applying the national statistics discussed above to the demographics of the North Dakota legal profession, two areas warrant additional analysis. First, on the national level, the small firm lawyers make up twenty-two percent of all lawyers, yet are responsible for forty-four percent of all legal malpractice claims.[279] In North Dakota, small firm lawyers comprise thirty-four percent of the legal profession.[280] Therefore, if the national ratio holds true in North Dakota, small firm lawyers would have the highest ratio of malpractice claims and would be the class of lawyers that the standard of care ought to specifically address. Perhaps this subset of the legal profession is being held to an unreasonably high standard of care due to the circumstances of the groups' practice. Small firm practitioners may be practicing in communities with a large population of legal specialists, thereby subjecting them to a level of excellence which they cannot reasonably achieve. If so, perhaps the courts should add a limiting element such as "under

276. *Id.* at 21. The ABA study explained the basis for the categories used to divide up the claims:

> Among administrative errors, almost half (43%) are due to failure to calendar properly. Additionally, 21% of these alleged errors are attributed to procrastination in performances or lack of follow-up. Among substantive errors, failure to know or properly apply the law (23%), inadequate discovery of facts or inadequate investigation (21%), planning error in choice of procedures (19%), and failure to know or ascertain deadline correctly (16%) are leading offenders. Of client relations errors, over half (55%) are attributed to failure to obtain client's consent or to inform client and more than one third (36%) to failure to follow client's instructions. Intentional wrongs are primarily split between malicious prosecution or abuse of process (33%) and fraud (33%).

Id. at 6.

277. *Id.* at 21.

278. *Id.*

279. *Id.* at 20.

280. 1985 SUPPLEMENT, *supra* note 249, at 112.

similar circumstances,"[281] or a higher standard for legal specialists,[282] to counterbalance any unfair disadvantage placed upon small firm practitioners. Such limiting factors separate lawyers who specialize from those who are generalists and holds each particular class to a standard of care that each group is capable of achieving.

There may be a problem peculiar to small firms, however, that ought to be dealt with by means other than litigation. A possible explanation for the high rate of malpractice claims made against small firms may be that small firm practitioners are attempting to specialize in certain areas without having the time and resources necessary to attain the skill and knowledge necessary to be specialists in that given area.[283] If such is the case, then the standard of care should not be altered to accommodate small firm practitioners. To do so would allow lawyers to practice in areas in which they are not competent without having fear of liability for their mistakes. This would be unfair to society. If small firm practitioners are attempting to compete in areas in which they are incompetent, they should be held liable for the injury they cause and should be forced to compensate their clients accordingly. Therefore, if this is the problem causing small firm attorneys to be responsible for a disproportionate level of claims, the solution must come from a source other than the reformulation of the standard of care.

C. GEOGRAPHICAL LIMITATIONS

In considering what method is needed to best address the statistical disparity of the small firm lawyer to malpractice claims, one must first consider whether implementing a geographical limitation within the standard of care for lawyers would serve to protect lawyers practicing in firms of two to five members from unfair standards, while still serving the best interests of the public by encouraging quality legal services. The legal profession in North

281. For a discussion of the "under similar circumstances" variation, see *supra* notes 172-196 and accompanying text.

282. For a discussion of the specialists standard, see *supra* notes 197-238 and accompanying text.

283. *See* Chaplin, *supra* note 186, at 379 (three factors which are to be considered in undertaking employment in an area where one is not already qualified are preparation, time, and cost); *see also*, Chaplin, *supra* note 212, at 311-12 (too much information and experience is needed in each area of the law to make it efficient and cost-effective for a lawyer to competently handle more than the most mundane problems in very few areas of practice).

Dakota is homogeneous,[284] and therefore, it is difficult to statistically differentiate between a rural small firm lawyer and an urban small firm lawyer since a small firm practitioner does not necessarily practice in a rural area. Therefore, in North Dakota the locality of practice does not explain the large number of malpractice claims against this group, and adding a geographical limitation to the standard of care would be overinclusive.

If the locality of practice does not explain the disproportionate number of malpractice claims made against lawyers in firms of two to five practitioners, then perhaps there are other circumstances which affect this group more than others.[285] If the problem is that small firm practitioners are practicing in communities which have a large population of specialists and the customary level of skill is extraordinarily high, then the addition of an "under the circumstances" element or a higher standard for specialists would protect small firm general practitioners from being held to the same standard of care as the specialists in the community where they practice. In this situation, a bare locality rule would prejudice rather than protect the small firm practitioner because it would group all lawyers in the same locality, including the specialists, into one class.[286] Unlike a geographical limitation, an "under the circumstances" or a higher standard for specialists protects the public from misrepresentation.[287] In other words, a rule which measures liability by claimed expertise ensures that "what you see is what you get."

If the reason behind the large number of claims attributable to small firm lawyers is that they are attempting to specialize without having sufficient resources to do so, then no limiting element added to the general standard of care would provide this group with added protection, nor should it. Small firm specialists ought to be held to the higher standard of care to which they represent themselves to be capable of attaining.[288] If small firm practitioners are attempting to specialize without the necessary preparation, then the malpractice claims against this group are justified and the

284. MELONE, BRAUD & OUGH, *supra* note 227, at 7.

285. The following examples are for illustrative purposes only and this Note does not attempt to exhaust the possibilities of the causes for the disproportionate number of malpractice claims made against lawyers in firms of two to five practitioners.

286. For a discussion of how a locality rule can prejudice rather than protect an attorney, see *supra* note 112-21 and accompanying text.

287. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 334 (practitioner who of necessity must generalize his or her practice ought not be compared to an attorney with the opportunity to limit his or her practice to one area of law).

288. D. MEISELMAN, *supra* note 86, at 24-27.

judicial system should function to compensate those who are injured by this practice. The solution to this problem lies not with the judicial system, but rather with programs designed to enhance the competence of this group so that they may provide the quality of services that are demanded by clients.[289] If this is not possible, then lawyers who are not competent to handle certain types of cases have a duty to refer them to one who is competent in that specific area of law.[290]

The second issue which must be addressed when applying the national statistics to the legal profession in North Dakota is why administrative errors increase as the size of the law firm decreases, and how these errors can best be avoided.[291] The ABA study, *Profile of Legal Malpractice*, includes two types of behavior within the definition of "administrative error." Forty-three percent of the administrative errors resulted from failure to calendar properly and twenty-one percent involved procrastination.[292] The question arises whether the locality of practice contributes to these problems. Since administrative errors include procrastination and failure to calendar properly, the most likely cause for administrative error is inefficient office practice.[293] Out of necessity, larger firms most likely have more elaborate systems for office management. Although a rural practice may be more prone to administrative errors because of their small size and financial constraints, there seems to be no rational reason why a simple organizational method would not work just as well on a smaller scale. Even the most minimal support staff, systematic planning, and a simple "tickler" file would serve to alleviate these types of administrative errors.

Unlike a substantive error that is related to access to research resources or experience in litigation strategy, administrative error is not the result of a deficiency in resources, except perhaps support staff. Because the legal profession in North Dakota is so homogeneous, location of practice does not indicate why administrative errors are more common to small practices. Therefore, there appears to be no logical reason why administrative error

289. For a discussion of methods to enhance the competence of lawyers, see *infra* notes 337-40 and accompanying text.

290. For a discussion of the duty to refer, see *infra* notes 329-36 and accompanying text.

291. D. MEISELMAN, *supra* note 86, at 26 (many errors are due to carelessness rather than lack of knowledge).

292. PROFILE OF LEGAL MALPRACTICE, *supra* note 23, at 6.

293. R. MALLEN & V. LEVIT, *supra* note 5, § 12 at 33 (proper file organization is crucial in preventing many errors which result in malpractice claims).

would be the result of an attorney's location.[294]

Even though the legal profession as a whole in North Dakota is a very homogeneous group and while only a small percentage of the lawyers actually practice in a truly rural setting, it may be possible that rural lawyers do at times suffer a significant disadvantage due to their location. Whenever a group of persons are categorized together by an external characteristic that they share, problems can occur due to over or underinclusiveness.[295] A geographical limitation is a very crude tool to measure a standard of care. A geographical limitation may be overinclusive if attorneys that need protection from an unreasonable standard do not qualify because the community they practice in is populated with specialists. Geographical limitations may be underinclusive if individuals that have been injured by malpractice have no recourse because no attorney in the community is qualified to handle the particular task. Special care must be taken in a state like North Dakota, where the groups to be classified (rural lawyers and urban lawyers) are very similar to each other or where characteristics overlap, so that the unfairness of over or underinclusiveness can be avoided.

D. NORTH DAKOTA'S CURRENT STANDARD OF CARE

The current standard of care for lawyers in North Dakota was adopted in 1971 by the supreme court in *Feil v. Wishek*.[296] In *Feil*, an attorney failed to advise his clients that a contract for the sale of furniture, fixtures, and merchandise should be filed with the registrar of deed to create a lien on the goods.[297] The purchasing party filed for bankruptcy and the plaintiffs were left with the status of general creditors.[298] The defendant attorney contended

294. Administrative errors are often the result of carelessness, and if the error is obvious, courts may treat the issue of negligence as a question of law. *See* Martinson Bros. v. Hjellum, 359 N.W.2d 865, 872 (N.D. 1985) (whether an attorney breached a professional duty is ordinarily a question of fact, but where reasonable minds cannot differ, the question is treated as one of law); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 181 (N.D. 1981) (same).

295. *See* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949). The authors state that the essence of equal protection is that "those similarly situated be similarly treated." *Id.* at 345. They also note that "[a] reasonable classification is one which includes all who are similarly situated and none who are not." *Id.* Finally, the authors conclude that the reasonableness of a classification depends upon the relation between the class that the statute intends to affect and the class which the statute actually affects. *Id.* at 347. According to the authors, if the rule does not relate well to the problem group, it is either overinclusive or underinclusive, or both. *Id.* at 344-53. Therefore, the authors suggest that an unreasonable classification may be a source of injustice. *Id.*

296. 193 N.W.2d 218, 225 (N.D. 1971).

297. Feil v. Wishek, 193 N.W.2d 218, 219-20 (N.D. 1971).

298. *Id.* at 220.

that such advice would have been premature because the parties did not provide him with a list of the property for attachment to the agreement.[299] The North Dakota Supreme Court announced the standard of care, holding:

> [T]he attorney in the instant case, failed to exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers *of this State*, in not advising his clients that the agreement should be filed in the appropriate office.[300]

Therefore, the North Dakota Supreme Court applied a geographical limitation to the standard of care, that limitation being the state, thereby subjecting all lawyers within the state to the same standard of care.[301]

The North Dakota Supreme Court adopted this standard of care for lawyers from a Washington case, *Cook, Flanagan & Berst v. Clausing*.[302] The Washington Supreme Court quoted the Restatement (Second) of Torts,[303] which includes a general standard requiring a professional to "exercise the skill and knowledge normally possessed by members of that profession."[304] The Restatement language quoted by the court in *Cook* also included the geographical element, "in similar communities."[305] The Washington court discounted this locality language, holding that an attorney must perform his professional services with that degree of skill, care, and knowledge, commonly possessed and exercised by reasonable and prudent lawyers in the jurisdiction.[306] The North Dakota Supreme Court in *Feil* therefore apparently adopted this version of the standard of care from the Washington

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299. *Id.* at 223.

300. *Id.* at 225 (emphasis added). The court quoted a New Jersey case with approval. *Id.* at 224; *see* McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102 (1926). In *McCullough*, the court stated a general standard of care, holding an attorney to "reasonable knowledge and skill ordinarily possessed by other members of his profession." *Feil*, 193 N.W.2d at 224 (quoting *McCullough*, 102 N.J.L. at 384, 132 A. at 103). The *Feil* court also quoted a California case with approval which stated that an attorney will be held liable for want of such skill and diligence as lawyers of ordinary skill commonly possess. *Feil*, 193 N.W.2d at 225; *see* Theobald v. Byers, 193 Cal. App. 2d 147, __, 13 Cal. Rptr. 864, 865-66 (1961).

301. *Feil*, 193 N.W.2d at 225.

302. 73 Wash. 2d 393, 438 P.2d 865 (1968).

303. Cook, Flanagan & Berst v. Clausin, 73 Wash. 2d 393, __, 438 P.2d 865, 866 (1968); *see* RESTATEMENT (SECOND) OF TORTS § 299A (1965).

304. *Cook*, 73 Wash. 2d __, 438 P.2d at 866 (quoting RESTATEMENT (SECOND) OF TORTS § 299A (1965)).

305. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 299A (1965)).

306. *Id.* at __, 438 P.2d at 866-67. R. MALLEN & V. LEVIT, *supra* note 5, § 254, at 336 ("Supreme Court of Washington reasoned that all attorneys within its jurisdiction are licensed by the state, and as is true in most jurisdictions, are subject to minimum and standardized qualifications").

case.[307]

In 1981, the North Dakota Supreme Court appeared to alter the statewide locality standard of care in *Sheets v. Letnes, Marshall & Fiedler, Ltd.*[308] In *Sheets*, the court stated that the standard of care for lawyers was "that degree of skill, care, diligence and knowledge as is ordinarily possessed by members of the legal profession in good standing *in similar communities*."[309] Although the court cited *Feil*, it apparently adopted the standard in the Restatement (Second) of Torts § 299A which utilizes the "similar communities" language, rather than applying the previous "in the state" language of *Feil*.[310] The court in *Sheets* did not, however, make the community an issue, so perhaps this deviation was merely an oversight. On the other hand, it may be that the court did not want to set an inflexible standard, and therefore refused to strictly adhere to one standard for all cases.

Although the addition of a similar localities element to the standard of care for lawyers alleviates problems that weakened the basic locality rule (i.e., the "conspiracy of silence" and shortage of experts), it is still a crude method to distinguish the level of resources that are available to a particular lawyer. This is the case since lawyers of different skill levels may practice within the same community. Therefore, in North Dakota, where the majority of the lawyers are general practitioners, regardless of whether they practice in a rural or urban locality, the similar communities standard would not be useful to distinguish levels of resources and opportunities.

Furthermore, as illustrated in *Cook v. Irion*, the similar localities element does not account for specific differences in the local

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307. *See* Feil v. Wishek, 193 N.W.2d 218, 224-25 (N.D. 1971). The court in *Feil* stated no other rationale for adopting the "in the state" rule. *Id.*

308. 311 N.W.2d 175, 180 (N.D. 1981).

309. Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D. 1981) (emphasis added). In *Sheets*, the client alleged that the defendant law firm had negligently failed to commence a wrongful death action within two years following the death of her husband. *Id.* at 177. The district court judge granted the plaintiff summary judgment as a matter of law on the issue of liability for legal malpractice. *Id.* The North Dakota Supreme Court held:

> The degree of uncertainty as to the applicable statute of limitations coupled with the requirement that an attorney exercise the degree of skill and care ordinarily exercised by attorneys *under similar circumstances* requires a factual determination to ascertain whether or not there was a violation of that standard of care.

Id. at 181 (emphasis added). The supreme court also found that different inferences could be drawn from the facts in favor of the defendant and therefore, reversed the summary judgment. *Id.* The fact that the supreme court mentioned a third variation on the standard of care indicates that in this case, geographical factors were irrelevant. *See id.*

310. *Feil*, 193 N.W.2d at 225; *see* RESTATEMENT (SECOND) OF TORTS § 299A (1965).

rules and customs that may be relevant to establishing whether a lawyer's conduct was reasonable.[311] Under the North Dakota Rules of Court, trial courts are not given discretion to customize their local rules.[312] Nevertheless, in contravention of the official rules, several courts do have requirements for motion practice particular to their respective districts.[313] The result is a reduction in uniformity among the districts throughout the state. In addition, social scientists recognize that there is a cultural dichotomy between eastern and western North Dakota.[314] Therefore, the "similar localities" element may not take into account a lawyer's conduct in relation to such peculiarities, and experts drawn from similar localities may not be qualified to testify as to the appropriate standard of care in that specific locality.[315]

In a 1985 case, *Martinson Bros. v. Hjellum*,[316] the North Dakota Supreme Court restated its original holding in *Feil v. Wishek* that the standard of care is measured by that degree of skill and care exercised by a reasonable and prudent lawyer within the state.[317] The court also cited *Sheets* without distinguishing or even reiterating the holding in *Sheets* that the standard of care was to be measured by the skill and care possessed by members of the legal profession in similar communities.[318] Furthermore, the court in *Martinson* placed significant weight on the particular circumstances of the case, as the court stated:

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311. *See* Cook v. Irion, 409 S.W.2d 475, 478 (Tex. Civ. App. 1966). For a discussion of *Cook*, see *supra* notes 136-56 and accompanying text.

312. *See* NORTH DAKOTA RULES OF COURT Rule 1.1 (1988) (rules of court apply to all courts of this state).

313. Interview with Larry Kraft, Professor of Law, University of North Dakota School of Law (March 10, 1988).

314. T. PEDELISKI, R. KWEIT, M.G. KWEIT, & L. OMDAHL, CLEAVAGES ON RECENT BALLOT MEASURES: THE TWO STATES OF NORTH DAKOTA? 9-11 (North Dakota Bureau of Governmental Affairs S.R. 81 #1987) (east and west serves as a base for diverging political cultures in North Dakota).

315. For a discussion of the problems associated with expert testimony and the "similar localities" standard, see *supra* notes 129-35 and accompanying text.

316. 359 N.W.2d 865 (N.D. 1985).

317. Martinson Bros. v. Hjellum, 359 N.W.2d 865, 872 (N.D. 1985); Feil v. Wishek, 193 N.W.2d 218, 225 (N.D. 1971). In *Martinson*, the client sued the defendant attorney for negligence in redrafting a contract for the sale of farmland and equipment, failure to assert a nonseverability defense in a foreclosure action, failure to document the agreement, and failure to consult the clients upon discovering discrepancies between two financial statements. *Martinson Bros.*, 359 N.W.2d at 872. The trial was before the district court judge with expert testimony having been presented by both parties. *Id.* at 871. The trial judge held that the "[defendant's] representation of the [plaintiffs] did not fall below the standard of performance exercised by reasonable, careful, and prudent lawyers in the practice of law in the state of North Dakota." *Id.* Since the district court's judgment was upheld on appeal, the North Dakota Supreme Court appears to have reverted to the standard first announced in *Feil*. *Id.*; *see Feil* 193 N.W.2d at 225.

318. *Id.*; *see* Sheets v. Letnes, Marshall & Fiedler, Ltd., 313 N.W.2d 175, 180 (N.D. 1981).

> It appears that both parties were anxious to consummate the purchase agreement and wished to have the agreement expedited. *Under these circumstances*, we cannot say that the trial court erred in finding that Hjellum did not negligently redraft the agreement. . . .
>
> Having carefully reviewed the record, we cannot conclude that the trial court's finding that Hjellum acted reasonably *under the particular circumstances* of this case is clearly erroneous.[319]

Since the pronouncement of the standard of care in *Feil v. Wishek*, the North Dakota Supreme Court has, at times, included three different limiting elements within its formula. Therefore, it is unclear where the North Dakota court stands on the locality rule issue. It may be that the court does not consider such elements as determinative issues of law. On the other hand, the court may favor flexibility. Most likely, the above quoted language may be merely an example of good legal reasoning and the process of applying the general rule to all pertinent facts. The adoption of a more explicit standard of care by the North Dakota Supreme Court, one which would call for the degree of skill and care exercised by a reasonable and prudent lawyer in the state under the particular circumstances, would offer both uniformity and flexibility in addressing legal malpractice actions.

E. THE EFFECTIVENESS OF AN "IN-THE-STATE" STANDARD

The "in-the-state" standard provides a uniform yardstick by which to measure a lawyer's performance. This standard was set forth in the North Dakota case, *Feil v. Wishek*, which provided that all lawyers must "exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers of this State. . . ."[320] By making the state the locality of practice, this standard ought to prevent the importation of expert witnesses from outside of North Dakota.[321] In certain instances, it would be unfair to subject North Dakota lawyers to the same standard of care to which California or New York lawyers are held because those states are primarily metropolitan. In the states that are largely urban, there are a greater number of large firms, and

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319. Martinson Bros., 359 N.W.2d at 873, 875 (emphasis added).

320. Feil v. Wishek, 193 N.W.2d 218, 225 (N.D. 1971).

321. For a discussion of the use of expert testimony with the "in the state or jurisdiction" variation, see *supra* notes 164-65 and accompanying text.

consequently, there is more opportunity to speciaize.[322] As of 1985 in North Dakota, however, the largest firm has no more than twenty lawyers, whereas in large cities, firms of over 100 lawyers are not uncommon.[323] Therefore, since North Dakota is a rural state where the majority of the lawyers are general practitioners, a standard of care that is limited to the state boundaries serves to protect North Dakota lawyers from the imposition of an unreasonably high standard of care.

Conversely, the "in-the-state" standard has been criticized as promoting an unacceptably low standard of care within a state's boundaries.[324] It is plausible that no lawyers in a particular state are competent to work in certain areas of the law, such as securities regulation, patent, or admiralty law. Therefore, the customary level of skill within a given state in those areas of law may be unacceptably low.

In *Feil*, the North Dakota Supreme Court adopted the "in-the-state" element of the standard of care from *Cook*, a case decided by the Washington Supreme Court.[325] The Washington Supreme Court applied the "in-the-state" standard, reasoning that the qualifications for the practice of law were the same throughout the state and did not significantly differ among the various communities.[326] Therefore, the Washington court held that all lawyers in the state should be held to the same standard of care.[327] If this standard is read literally, a lawyer practicing in an isolated rural community would have to find means other than a locality rule to protect him or herself from malpractice claims arising from a lack of resources. The North Dakota Supreme Court has declined to place a strict interpretation on the "in-the-state" element of standard of care for lawyers which would call for absolute uniformity. In the alternative, the North Dakota Supreme Court has considered the circumstances of the particular case to allow for some flexibility.[328] It is plausible that the North Dakota Supreme Court,

322. *Compare* 1985 SUPPLEMENT, *supra* note 249, at 112 (zero percent of firms in North Dakota have over 20 lawyers) *with* THE LAWYER'S ALMANAC 2-26 (1984) (listing the 200 largest law firms in the U.S.).

323. *Compare* 1985 SUPPLEMENT, *supra* note 249, at 112 (zero percent of firms in North Dakota have over 20 lawyers) *with* THE LAWYER'S ALMANAC 2-26 (1984) (listing the 200 largest law firms in the U.S.).

324. Note, *supra* note 14, at 406.

325. Feil v. Wishek, 193 N.W.2d 218, 224-25 (N.D. 1971); *see* Cook, Flanagan & Berst v. Clausin, 73 Wash. 2d 393, __, 438 P.2d 865, 866 (1968).

326. *Cook*, 73 Wash. 2d at __, 438 P.2d at 866.

327. *Id.* at __, 438 P.2d at 866.

328. *See* Martinson Bros. v. Hjellum, 359 N.W.2d 865, 873, 875 (N.D. 1985) (court utilized the "in-the-state" rule, but considered the circumstances of the transaction when justifying the result); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180-81

if faced with a fact pattern where the defendant was a rural lawyer, would consider locality of practice or lack of resources as circumstances which might vary the standard of care.

If the standard of care does not vary according to the facts of each case, an attorney faced with a difficult case may have to refer it to, or associate with, an attorney in a better position to handle the case.[329] There are several problems with relying on referrals, association, or consultation to enhance competence in the legal profession. First, a lawyer cannot make a living if he or she has to hire an expert or pass the problem on to another attorney.[330] Second, in rural areas, there simply may not be other attorneys available who are more competent on the given subject matter.[331] Finally, the Model Code of Professional Responsibility discourages referrals by inhibiting fee splitting.[332] The Model Code only allows the division of fees in proportion to the services performed and responsibility assumed by each attorney.[333] This problem has been alleviated somewhat in states that have adopted the Model Rules[334] which allows for the fees to be divided, with the consent of the client, in any way the associating attorneys like as long as each attorney assumes joint responsibility for the services.[335] Some states have alleviated this problem by implementing novel approaches that enhance referrals and consultation with other attorneys.[336]

(N.D. 1981) (court stated "similar communities" rule, but considered the uncertainty of judicial precedent as a circumstance to vary the standard of care).

329. *Cf.* Walter, *When a Case Seems Out of Your League*, 1 COMPLEAT LAWYER 24 (Winter 1984). Both the Model Code and Model Rules contain a duty to refer a case to a lawyer who is more competent when the practitioner feels insecure about his or her ability. MODEL CODE, *supra* note 20, DR 6-101 (A)(1); MODEL RULES, *supra* note 20, Rule 1.1 comment. For the language from the Model provisions see *supra* note 20; *see also*, Horne v. Peckham, 97 Cal. App. 3d 404, 414, 158 Cal. Rptr. 714, 720 (1979) (general practitioner has a duty to refer a client to a specialist if, under the circumstances, it would be reasonable and prudent to do so).

330. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 34 (attorneys are reluctant to limit their practice because they need the money).

331. J. ELWELL, *supra* note 41, at 22-23 (in rural areas, professionals may have to act in an area of expertise in which they are not experienced, or the client will have to go without services completely).

332. TASK FORCE ON THE GENERAL PRACTITIONER, *supra* note 187, at 34; MODEL CODE, *supra* note 20, DR 2-107(A).

333. TASK FORCE ON THE GENERAL PRACTITIONER *supra* note 187, at 35; MODEL CODE, *supra* note 20, DR 2-107(A).

334. For a list of the states which have adopted the Model Rules of Professional Conduct, see *supra* note 27.

335. TASK FORCE ON THE GENERAL PRACTITIONER *supra* note 187, at 34-35; *see* MODEL RULES, *supra* note 20, Rule 1.5(e).

336. *E.g.*, Branch, *Use Your Lawyer-to-Lawyer Directory*, 57 WIS. B. BULL. 11 (Sept. 1984). The author notes:

> One readily available tool to reduce malpractice losses is the State Bar Lawyer-to-Lawyer Directory, which was published in the July 1983 Wisconsin

Another means for a rural lawyer to enhance his or her competence is to conduct sufficient research. Although this may be somewhat costly, modern methods such as computer databases serve to make the process of learning new law more efficient.[337] Like the option of referring a case, research has also been characterized as a duty that a lawyer must perform if he or she is going to take the case.[338]

Today there are various resources available to a North Dakota attorney at a relatively low cost. For instance, the University of North Dakota School of Law, in cooperation with the State Bar Association of North Dakota, offers "Services for Attorneys" which includes: photocopying requested cases, computer-assisted searches, book loans, audio and video cassette loans, a Lexis computer research co-op, and on-call research by law students.[339] In addition, to assure continued competence, each attorney in North Dakota must complete 45 hours of Continuing Legal Education (CLE) course work every three years.[340] Therefore, to maintain a valid license to practice law, a North Dakota attorney must move

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Bar Bulletin. While malpractice cause of loss analysis is still in its infancy, it is clear that lawyers make more mistakes, errors and omissions when practicing in an unfamiliar area of law.

If consulted about a matter outside your own prior experience, ask another lawyer about it. That is what lawyers in law firms — large and small — do. It saves time and points the lawyer in the right direction, making him or her aware of the key issues. If you don't practice in a firm or no other lawyer in your firm has experience or "expertise" in the area of law with which you are dealing, use your Lawyer-to-Lawyer Directory. It costs you no more than the cost of a telephone call, and it just might save you money and your client from being damaged by an error or omission.

Id.

337. Combs, Moorhead & Donahue, *Get on Track with On- Line Research*, 3 COMPLEAT LAWYER 25 (Spring 1986).

338. *See* Horne v. Peckham, 97 Cal. App. 3d 404, 415, 158 Cal. Rptr. 714, 721 (1979) (with respect to an unsettled area of the law, an attorney assumes an obligation to his client to undertake reasonable research); Smith v. Lewis, 13 Cal. 3d 349, 358-59, 530 P.2d 589, 596, 118 Cal. Rptr. 621, 627 (1975) (attorney assumes an obligation to his client to undertake reasonable research); Bowen v. Arnold, 380 N.W.2d 531, 534 (Minn. Ct. App. 1986) (lawyer has a duty to the client to inform himself completely and accurately); Procanik v. Cillo, 206 N.J. Super. 270, __, 502 A.2d 94, 102 (1985) (attorneys are absolutely responsible for researching case law decisions as well as advance sheets); O'Connell, *Legal Malpractice: Does the Lawyer Have a Duty to Use Computerized Research?*, 35 FED. INS. COUNS. Q. 77, 89-92 (1984-85) (reasonable attorney would use computerized research).

339. UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW/STATE BAR ASSOCIATION OF NORTH DAKOTA, SERVICES FOR ATTORNEYS (June 1986).

340. NORTH DAKOTA COURT RULES 806 (1988); *see also* LAWYERS' MANUAL, *supra* note 2, at 21:3001-08 (21 states have mandatory CLE for active members of the bar: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming); ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY SINCE ARDEN HOUSE II 1-5 (1984).

to improve his or her skills, theoretically maintaining the level of skill possessed at the time the bar examination was first passed.

Realistically, even with the methods available for increasing one's competency as described above, some legal problems are not successfully disposed of without a considerable degree of experience and support.[341] Therefore, the urban practitioner in a large firm, with the ability to limit his or her practice, will necessarily perform at a higher level of competency in certain areas of the law.[342] Working in a large firm not only allows an attorney the opportunity to specialize, but also allows the pooling of capital to develop a larger library and the luxury of a support staff.[343] The "in-the-state" standard, by itself, does not distinguish between the large firm specialist and the rural general practitioner. Therefore, it may be necessary to combine an additional standard of care limitation with the "in-the-state" standard to give the standard of care for lawyers the flexibility necessary to account for differences in available resources.

F. SUGGESTIONS FOR MODIFICATION

If interpreted strictly, the "in-the-state" element of the standard of care is very inflexible. This inflexibility may be mitigated by the addition of an element which allows for different skill levels and available resources. In 1979, the Washington Supreme Court added a higher standard of care for specialists to its "in-the-state" standard.[344] Lawyers in Washington are held to "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in th[e] jurisdiction;"[345] however, "one who holds himself out as specializing and as possessing greater than ordinary knowledge and skill in a particular field, will be held to the standard of

341. Chaplin, *supra* note 212, at 311-12. The author notes in pertinent part:

> It is becoming more and more common for lawyers to affiliate themselves in larger and larger law partnerships organized along fairly rigid departmental lines such as litigation, tax, estate planning and probate, corporate, and real estate. There is simply too much information and practical experience to be obtained in each of these areas to make it efficient, let alone *cost-effective*, for a lawyer to handle competently more than the most *mundane* problems in more than a very few areas of practice at any given time.

Id. (emphasis added).

342. *See id.*

343. *See id.* at 311-12.

344. Walker v. Bangs, 92 Wash. 2d 854, __, 601 P.2d 1279, 1283 (1979) (one who holds himself out as specialist in a particular field of law will be held to standard of performance of those who hold themselves out as specialists in that area).

345. *Walker*, 92 Wash. 2d at __, 601 P.2d at 1282 (quoting Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968)).

performance of those who hold themselves out as specialists in that area."[346] The combination of the two rules serves to protect the rural lawyer, most likely a general practitioner, from the effect of being compared to a group that includes specialists.[347] This combination also serves to protect the public since it holds those who profess to be specialists to a standard commensurate to their promised abilities. Furthermore, this combination continues to foster statewide uniformity and also provides an element of flexibility that is necessary to serve the best interests of the legal profession and society.

The combination of North Dakota's "in-the-state" element with an "under the circumstances" element included in the general standard of care for lawyers would have the same effect as a higher standard for specialists because specialization is a circumstance relevant to the standard of care.[348] Under this formulation, North Dakota lawyers would have to exercise that degree of skill and care commonly possessed and exercised by reasonable and prudent lawyers in the state under the given circumstances. The advantage of this formulation is that it is infinitely flexible because "circumstances" may include any factor relevant to the proper practice of law. The disadvantage of this version of a standard of care is that it provides less specific guidance to the trial court. Nevertheless, combining either a higher standard for specialists or including an "under the circumstances" element with the "in-the-state" element would provide a very workable and fair standard of care for lawyers which would serve the best interests of both the public and the legal profession in North Dakota.

V. CONCLUSION

As long as people need lawyers and lawyers practice law, there are going to be instances where the lawyer fails to provide the quality of services that society demands. Courts seek to protect society and deter wrongdoing by imposing liability on the party at fault. In order to measure a lawyer's conduct, courts devise stan-

346. *Id.* at __, 601 P.2d at 1283.

347. R. MALLEN & V. LEVIT, *supra* note 5, § 254, 334. The authors note:

> The ability of the practitioner and the minimum knowledge required should not vary with geography. The rural practitioner should not be less careful, less able or less skillful than the urban attorney. . . .This is not to say that the practitioner from a small community, who of necessity must generalize his practice, is to be compared with the city attorney who limits his practice to the subject matter of the dispute.

Id.

348. *Id.*, § 254, at 337.

dards of care which define the minimum level of acceptable services. Geographical elements such as the "locality rule" were devised to protect practitioners from liability when the true cause of injury was not a lack of care, but rather factors beyond the lawyer's control. Geographical elements included in the standard of care also protect society by requiring that a lawyer be familiar with the circumstances unique to his or her locality of practice and holding him or her to the level of care reasonably achievable under the circumstances.

There are two basic flaws in the basic locality rule presumption. First, it may have the effect of lowering the standard of care to an unacceptable level in a small town or it may raise the standard of care to an unattainable level in metropolitan areas where specialization is the norm.[349] Second, it may create a "conspiracy of silence" because lawyers in the same community are often unwilling to provide the necessary expert testimony to define what a reasonable and prudent lawyer would have done in that particular situation.[350]

One alternative to the locality rule is to add the "under the circumstances" element to a general standard of care. This standard is like the "reasonable man" standard in an ordinary negligence case in that it requires a lawyer to exercise a reasonable degree of care under the circumstances in which he or she must act. This provision provides a high degree of flexibility to the parties and the court in fashioning a standard that is fair to both the attorney and the client. The "under the circumstances" standard may be too general, however, since it provides trial courts with very little guidance. Furthermore, it provides no protection against the importation of foreign experts who may testify to a standard of care to which a North Dakota attorney is not familiar. Finally, proper legal reasoning by counsel for the parties and the court may always take into consideration the relevant facts and apply them to the law, regardless of a specified element.

To avoid these problems and yet still maintain a level of protection for rural or general practitioners, some courts, such as the North Dakota Supreme Court, have expanded the geographical limitations within the standard of care to the boundaries of the state. This evolution was helpful in keeping experts' fees down

349. For a discussion of the effect of the locality rule on the general practitioner, see *supra* notes 114-21 and accompanying text.

350. For a discussion of the "conspiracy of silence" associated with expert testimony, see *supra* notes 122-26 and accompanying text.

and allowing for the special nature of the profession in the state, but it does not help the rural lawyer who must make a living and serve the public under sometimes less than ideal conditions.

The inflexibility of the "in-the-state" standard may be mitigated by holding those who represent themselves to be "specialists" to a higher standard of care.[351] Because a rural lawyer is usually a general practitioner and an urban lawyer is more likely to be a specialist, this combination serves to protect the rural lawyer from an unrealistic standard and protects the public from backwater pools of incompetence. This standard can be made even more specific by adding a duty to research and a duty to refer to the standard of care. These duties demand that the lawyer think through each case and make a reasonable decision that is in the best interests of the client. This combination serves the best interests of both the public and the profession in North Dakota by providing a uniform standard for a homogeneous legal community and yet taking into consideration the modern reality of specialization.

Dwain E. Fagerlund

351. Walker v. Bangs, 92 Wash. 2d 854, __, 601 P.2d 1279, 1282-83 (1979).